STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH
ATTORNEY GENERAL

SUITE 1100
445 MINNESOTA STREET
ST. PAUL, MN 55101-2128
TELEPHONE: (651) 282-5700

May 8, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th St. S.W., CY-B402
Washington, D.C. 20554

Re: In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the State of Minnesota WC Docket No. 03-90

Dear Ms. Dortch:

Enclosed for electronic filing are the Reply Comments of the Minnesota Public Utilities Commission ("MNPUC") Regarding the Application of Qwest Communications International, Inc. for Authority to Provide In-Region Interlata Services in Minnesota.

Any questions regarding the filing of this application may be directed to me at 651-297-1852 or by email to karen.hammel@state.mn.us.

Sincerely,

KAREN FINSTAD HAMMEL
Assistant Attorney General

(651) 297-1852

Enclosures

AG: #848514-v1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by	)	
Qwest Communications International, Inc.	)	WC Docket No. 03-90
for Authorization to Provide In-Region,	)	
InterLATA Services in the State of Minnesota	)	

May 8, 2003

REPLY COMMENTS OF THE MINNESOTA PUBLIC UTILITIES COMMISSION REGARDING THE APPLICATION OF QWEST COMMUNICATIONS INTERNATIONAL, INC. FOR AUTHORITY TO PROVIDE IN-REGION INTERLATA SERVICES IN MINNESOTA

LeRoy Koppendrayer, Chair
R. Marshall Johnson, Commissioner
Phyllis Reha, Commissioner
Gregory Scott, Commissioner
Ellen Gavin, Commissioner (not participating)

Minnesota Public Utilities Commission
121 Seventh Place East, Suite 350
St. Paul, MN 55101-2147
(651) 296-7124

TABLE OF CONTENTS

I. INTRODUCTION

The Minnesota Public Utilities Commission ("MNPUC") filed initial comments in this proceeding on April 17, 2003. Three of the four Commissioners participating in the MNPUC proceedings recommended that the Federal Communications Commission ("Commission") deny Qwest's application for permission to provide in-region interLATA services in Minnesota. One Commissioner recommended approval. The MNPUC files these reply comments in order to provide the Commission with updated information in MNPUC prodeedings that has become available since the MNPUC filed its initial comments. In addition, the MNPUC provides further information in its supplemental appendix relating to prior complaint proceedings and newly filed complaints that were not discussed in the previous comments.

II. DISCUSSION

A. UPDATED MATERIALS.

1. Secret agreements proceeding.

On February 28, 2003, the MNPUC issued an order assessing penalties in the complaint proceeding filed by the Minnesota Department of Commerce. *See In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corp. Regarding Unfiled Agreements*, Docket No. P-421/C-02-197, Order Assessing Penalties (2003); Initial Comments, at Appendix E (page 17, MNPUC Appendix). The MNPUC met on April 14, 2003 to consider petitions for reconsideration. The order reflecting the April 14 decision issued on April 30, 2003 and is attached to these comments as MNPUC Supplemental Appendix A. *See In re Unfiled Agreements*, Order After Reconsideration on Own Motion (April 30, 2003). The reconsideration order modifies the restitutional remedy based on further consideration of record evidence, and it eliminates the opportunity to stay the monetary penalty.

2. The § 271 pricing proceeding.

As part of its investigation into Qwest Corporation's ("Qwest") compliance with 47 U.S.C. § 271, the MNPUC conducted a pricing proceeding to determine prices for unbundled network elements ("UNEs") which had not been determined in a prior cost docket, and to revisit existing prices on other UNEs. Two of the MNPUC's orders in the pricing docket were submitted as part of Qwest's Minnesota Section 271 Application. *See* Minn. App., Appendix K, Vol. 7, Tab 211 and Tab 228; *In the Matter of the Commission Review and Investigation of Qwest's Unbundled Network Element Prices*, Docket No. P421/CI-01-1375, and *In the Matter of Review and Investigation of Certain Unbundled Network Element Prices of Qwest*, Docket No. P442, 421, 3012/M-01-1916, Order Setting Prices and Establishing Procedural Schedule (Oct. 2, 2002) and Order Denying Reconsideration (Nov. 26, 2002). The MNPUC set prices pursuant to Commission rules. The evaluation filed by the United States Department of Justice ("DOJ") states that "[t]he Minnesota PUC conducted state-specific pricing proceedings to establish unbundled network element ("UNE") rates that appear consistent with the Commission's prior analysis using the Colorado rates as benchmarks of TELRIC compliance." DOJ Evaluation, at 4.

After the MNPUC issued a third order[1] ruling on Qwest's compliance filing, Qwest appealed the MNPUC's decision to the United States District Court, District of Minnesota. *See Qwest Corporation v. Koppendrayer, et al.,* Civil File No. 03-2492 DSD/SRN, Complaint For Declaratory Judgment and Injunctive Relief to Prevent Enforcement of Public Utilities

[1] Order Accepting Filing and Opening New Docket (Mar. 24, 2003). This order is not included with these comments because it adds no relevant information in this proceeding.

Commission Orders (filed Apr. 23, 2003). A copy of this complaint is attached as MNPUC Supplemental Appendix B.

B. ADDITIONAL COMPLAINT PROCEEDINGS.

1. Newly filed complaints.

Eschelon Telecom, Inc. ("Eschelon") has filed three new complaints with the MNPUC since the MNPUC filed its initial comments on April 17, 2003. The MNPUC Commissioners previously advised the Commission that Qwest negotiated secret agreements with Eschelon prior to the time the Minnesota Department of Commerce filed its complaint against Qwest in MNPUC Docket No. P421/C-02-197. *See,* MNPUC Initial Comments, at 19-38. The record in that proceeding establishes that Qwest was willing to treat certain CLEC customers preferentially in return for Eschelon's and other CLECs' silence in regulatory proceedings, including this Section 271 proceeding before the Commission. Eschelon filed three new complaints with the MNPUC after initial comments were filed in Qwest's Minnesota Section 271 proceeding before the Commission.

a. First Eschelon Complaint: *In the Matter of Request for Investigation and Process for Addressing Time Critical Issues*, Docket No. C-03-616 (filed Apr. 21, 2003).

This complaint asks the MNPUC to investigate the nature and extent of improper contacts between Qwest Wholesale and Qwest Retail, as well as other issues raised by attached documentation concerning a particular customer-affecting conversion that went awry. A copy of this complaint is attached as MNPUC Supplemental Appendix C.

b. Second Eschelon Complaint: *In the Matter of the Complaint of Eschelon Telecom of Minnesota, Inc. against Qwest Corporation, Inc.*, Docket No. P421/C-03-627, Complaint Against Qwest Corporation, and Request for Expedited Proceeding Pursuant to Minn. Stat. 237.462 (filed Apr. 23, 2003).

This complaint alleges violations of the parties' Interconnection Agreement, certain violations of state law and violations of the Communications Act, specifically of 47 U.S.C. § 251(c)(2)(D) and § 252(i). A copy of this complaint is attached as MNPUC Supplemental Appendix D.[2]

c. **Third Eschelon Complaint**: *In the Matter of the Complaint Against Eschelon Corporation, and Request for Expedited Proceeding Pursuant to Minn. Stat. § 237.462*, Docket No. P421, C-03-683, Complaint Against Qwest Corporation, and Request for Expedited Proceeding Pursuant to Minn. Stat. § 237.462 (filed May 2, 2003).

This complaint alleges violations of the parties Interconnection Agreement and numerous problems with Qwest's billing. A copy of this complaint is attached as MNPUC Supplemental Appendix E.[3]

2. Additional documents in MNPUC complaint proceedings.

The MNPUC Commissioners discussed as part of their initial comments some of the most recent complaint proceedings that have been filed with the MNPUC. The DOJ based its conclusion that "Qwest has fulfilled its obligations to open the resale mode of entry to competition in Minnesota" largely upon the absence of CLEC complaints. To illustrate that the number of actual complaints is far more than was actually discussed by Commissioners in the

[2] The attachments filed with this complaint have not been included with these comments. If the Commission wishes to review them, the MNPUC will provide copies upon request.

[3] The attachments filed with this complaint have not been included with these comments. If the Commission wishes to review them, the MNPUC will provide copies upon request.

Initial Comments or addressed in the contested case proceeding concerning public interest, the MNPUC includes the following documents that illustrate the serious nature of CLEC complaints that have been filed with the MNPUC in the past few years:

- *In the Matter of a Formal Complaint by McLeod Telemanagement, Inc. against US WEST Communications, Inc. Regarding the Sale of Centron/Centrex Services*, P-421/C-96-968, Order Approving Tariff with Modification and Requiring Refund (Apr. 1, 1998), and Order After Reconsideration (June 11, 1998). These orders determined that Qwest could not impose its proposed chip-in charge to CLEC Centron resellers who had alleged anti-competitive and discriminatory resale terms. Copies of these Orders is attached as MNPUC Supplemental Appendix F.
- *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. against US WEST Communications, Inc. Regarding Access Service*, P-421/C-97-238, Order Allowing Withdrawal of Complaint (Aug. 12, 1998) (settling allegation that US WEST impeded competition by providing inadequate and inconsistent service to competitors). A copy of this Order is attached as MNPUC Supplemental Appendix G.
- *In the Matter of a Complaint of MCImetro Access Transmission Services, Inc. Against U S WEST Communications, Inc. for Anticompetitive Conduct*, P-421/C-97-1348, Order Finding Breaches of State Law and Interconneciton Agreement and Requiring Compliance, negotiations and Filings (July 29, 1998), Order After Reconsideration (Oct. 22, 1998), and Order Approving Settlement (Sep. 18, 2000). The MNPUC approved a settlement agreement reached by the parties after federal court litigation, settling an allegation that US WEST engaged in anticompetitive conduct regarding untimely order completion. The MNPUC also resolved an issue requiring U S West to file the settlement as an amendment to the Interconnection

Agreement; Qwest argued the settlement agreement was a "side agreement" that did not need to be filed. Copies of these three Orders are attached as MNPUC Supplemental Appendix H.

- *In the Matter of a Complaint by InfoTel Communications, LLC v. U S WEST Communications, Inc. Concerning Resale of Contract Services*, P-421/C-98-10, Order Construing Tariffs and Prohibiting Termination Charges in Resale Context (May 21, 1998) (finding US WEST Termination Liability Assessment (TLA) charge to competitors unjustified). A copy of this Order is attached as MNPUC Supplemental Appendix I.

- *In the Matter of U S WEST Communications, Inc.'s Introduction of MegaBit Services*, P-421/EM-98-471 (June 16, 1999) (settling allegation that US WEST discriminates in favor of its affiliate). A copy of this Order is attached as MNPUC Supplemental Appendix J.

- *In the Matter of U S WEST Communications, Inc.'s Proposed Revisions to Termination Liability Assessments*, P-421/EM-98-769, Order Rejecting Tariff/Price List Revisions, Clarifying Practical Effect of Filing, and Staying Implementation of Future Tariff/Price List Revisions (Oct. 13, 1998), and Order Denying Reconsideration (Feb. 4, 1999) (finding US WEST charged unjustified fees to customers taking competitors' service; barring US WEST from implementing any new termination liability charges without Commission review). Copies of these Orders are attached as MNPUC Supplemental Appendix K.

- *In the Matter of a Formal Complaint by the Members of the Minnesota Independent Payphone Association (MIPA) and Choicetel, Inc. Against U S WEST, Communications, Inc. Regarding Unbundling the Network Elements of Automatic Number Identification*, P-421/C-98-786, Order Granting Relief, Requiring Application of Wholesale Discount to PAL Service, and Limiting Service to Payphone Providers to PAL Service (Feb. 4, 1999), and Order Denying Reconsideration and Clarifying Earlier Order (Aug. 2, 1999) (finding US WEST wrongfully refused to resell service to competitors at a wholesale discount). A copy of this Order is attached as MNPUC Supplemental Appendix L.

- *In the Matter of a Complaint by First Call Communications, Inc. Regarding Installation and Order Change Procedures*, P-421/C-98-909, Order Requiring Answer to Complaint and Establishing Time Frames (July 6, 1998), and Order Staying Proceeding (Aug. 12, 1998) (settling allegation that US WEST had failed to connect a competitor's customers to the network, or to install features and services promptly). Copies of two orders are attached as MNPUC Supplemental Appendix M.[4]

- *In the Matter of a Complaint Relating to U S WEST Communications, Inc.'s Promotion of its MegaBit Services*, P-421/C-98-997, Order Accepting Settlement Agreements (June 16, 1999) (settling allegation that US WEST discriminates in favor of its affiliate). *See* MNPUC Supplemental Appendix K, referenced above with consolidated proceeding, MNPUC Docket No. P-421/EM-98-471.

- *In the Matter of AT&T and Sprint Communications Company, L.P. Required Release of All intraLATA Toll Carrier "Freezes" Instituted Without Prior Customer Authorization*, P-442, 466/EM-99-616, Notice (July 15, 1999) (settling allegation that US WEST restricted customers' ability to select a competing intraLATA toll carrier). A copy of this Notice is attached as MNPUC Supplemental Appendix N.

- *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against U S WEST Communications, Inc. Regarding Access Services*, P-421/C-99-1183, Order Finding Jurisdiction, Rejecting Claims for Relief, and Opening Investigation (Aug. 15, 2000). The

[4] The MNPUC has not been notified that the issues in this complaint were ever resolved and the complaint remains open and unresolved.

MNPUC concluded there was insufficient state-specific evidence to grant relief, but the record clearly demonstrated a need to investigate whether wholesale access service quality standards for U S WEST should be adopted.[5] A copy of this Order is attached as MNPUC Supplemental Appendix O.

- *In the Matter of a Complaint by Hutchinson Telecommunications, Inc. Against US WEST Communications, Inc. and Request for Expedited Enforcement of Interconnection Agreement*, P-421/DI-99-1458, Notice of Docket Closure (June 27, 2001) (settling allegation that US WEST delayed Hutchinson's market entry). A copy of this Notice is attached as MNPUC Supplemental Appendix P.
- *In the Matter of a Complaint by Dakota Telecom, Inc. Against U S WEST Communications, Inc. for Violation of an Approved Interconnection Agreement Requesting Expedited Proceeding and Temporary Relief*, P-421/C-00-373, Order Approving Settlement (July 25, 2001) (settling complaint that Qwest refused to provide necessary facilities to permit CLECs to provide PUC-mandated local calling area). A copy of this Order is attached as MNPUC Supplemental Appendix Q.
- *In the Matter of Qwest's Refiling of its Proposed Tariffs regarding Termination Liability Assessments as Applied to Resale Arrangements*, P-421/AM-00-1165, Order Rejecting

[5] Ultimately, Qwest challenged the MNPUC's determination in this case that it had jurisdiction over some aspects of mixed-use interstate special access channels. The issue of whether the MNPUC should establish special access service quality standards was consolidated with another MNPUC proceeding, *In the Matter of USWC Proposed Wholesale Service Quality Standards*, Docket No. P421/AM-00-949. The MNPUC required Qwest to provided certain reports on special access services. The Commission's decision finding jurisdiction in Docket No. C-99-1183 also became an issue in Docket No. AM-00-849 is presently on appeal to the Court of Appeals for the Eighth Circuit from the United States District Court, District of Minnesota (Docket No. 03-1489).

Tariff/Price List Revisions (Oct. 2, 2001). The MNPUC again rejected Qwest's proposed TLA tariff and concluded that the company's TLA proposal was not fair and reasonable, unreasonably restricts resale, and was anticompetitive and unreasonably discriminatory. A copy of this Order is attached as MNPUC Supplemental Appendix R.

CONCLUSION

The MNPUC respectfully submits the documentation identified above to assist the Commission in making its determination whether Qwest should be permitted to provide in-region interLATA services in Minnesota, and remains committed to providing the Commission with all relevant information concerning Qwest's Section 271 application.

Dated: May 8, 2003

Respectfully submitted,

Minnesota Public Utilities Commission

Burl W. Haar

BURL W. HAAR
Executive Secretary

121 Seventh Place East, Ste. 350
St. Paul, Minnesota 55101-2147
(651) 296-7526 (Voice)
(651) 297-1200 (TTY)

AG: #848456-v1

APPENDIX

INDEX

APPENDIX A

aY

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Ellen Gavin	Commissioner
Marshall Johnson	Commissioner
Phyllis A. Reha	Commissioner
Gregory Scott	Commissioner

In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements

ISSUE DATE: April 30, 2003

DOCKET NO. P-421/C-02-197

ORDER AFTER RECONSIDERATION ON OWN MOTION

PROCEDURAL HISTORY

On February 28, 2003, the Commission issued its ORDER ASSESSING PENALTIES in this matter.

On March 10, 2003, Qwest filed a petition for reconsideration.

On March 20, 2003, Eschelon and McLeod filed petitions for reconsideration.

On March 20, 2003, responses to Qwest's petition for reconsideration were filed by the Minnesota Department of Commerce (the Department), AT&T Communications of the Midwest (AT&T), MCI WorldCom (MCI), Time Warner, the CLEC Coalition and the NWB/US WEST Retiree Association (the Retirees).

On March 31, 2003, the Department and Qwest filed responses to McLeod's and Eschelon's petitions for reconsideration and Eschelon filed a response to McLeod's petition.

The Commission met on April 8, 2003 to consider this matter.

On April 10, 2003, the Commission issued a notice that it would meet on April 14, 2003 to clarify on its own motion its decision regarding the interstate access services purchased from Qwest.

On April 11, 2003, AT&T filed comments supporting inclusion of interstate access services among those for which Qwest would be required to give a retroactive ten percent discount.

The Commission met on April 14, 2003 to further consider this matter.

1

FINDINGS AND CONCLUSIONS

I. COMMISSION'S FEBRUARY 28, 2002 ORDER

In its February 28, 2003 Order, in addition to the $25,955,000 monetary penalty imposed in Order Paragraph 1, the Commission required Qwest to make restitution for its knowing and intentional anti-competitive and discriminatory actions. The restitution required by the Commission took two principal forms:

- Secret Provision Availability: the Commission required Qwest to make available to the disfavored competitive local exchange carriers (CLECs) provisions that it had secretly made available to the favored CLECs[1] and

- Returns/Discounts and Rebates: the Commission required Qwest to return to the disfavored CLECs amounts paid in excess of what the favored CLECs paid for certain services pursuant to the secret agreements, to give the CLECs the same rebates on access lines and platform lines that it gave to Eschelon, and to make certain Minnesota products and services available to the disfavored CLECs for a period of two years at the discounted price given the favored CLECs.

Specifically, in addition to the $25,955,00 monetary penalty, the Commission ordered restitutional remedies as follows:

1) Secret Provision Availability: Starting with the date of the Order, the disfavored CLECs would be able to avail themselves of the same terms given to the favored CLECs and would be able to do so for the same length of time that Qwest provided these terms to the favored CLECs. See Order Paragraph 2 of the February 28, 2003 Order.

2) Returns/Discounts: To remedy the fact that Qwest secretly gave Eschelon and McLeod a ten percent discount on certain of Qwest's goods and services pursuant to agreements intended to last for five years, the Commission required Qwest to give to the disfavored CLECs the approximate benefit that Qwest gave the favored CLECs. Specifically, the Commission required Qwest to return to each disfavored CLEC the difference between the amount the CLEC paid during a set two year period for Minnesota goods and services and the amount it would have paid for those goods and services if Qwest had given it the same 10% discount it gave Eschelon and McLeod (Order Paragraph 3a). The Commission also required Qwest to give each disfavored CLEC a 10% discount on all such goods and services in Minnesota that the CLEC would purchase during a two-year period beginning with the Order date. See Order Paragraph 4.

---

[1] In its petition for reconsideration, Qwest incorrectly and consistently referred to this requirement as an "opt-in" remedy authorized by and subject to Section 251 of the Federal Telecommunications Act of 1996. The Commission's Order is clear, however, that Order Paragraph 2 was not creating opt-in opportunities under Section 251, but was acting under the Commission's authority to remediate the effects of Qwest's discrimination under state law. See Order at page 19.

3) Rebates: To remedy the fact that Qwest had secretly given Eschelon rebates on certain services pursuant to 1) Eschelon Unfiled Agreement V - paragraph 5, 2) Eschelon Unfiled Agreement IV - paragraph 2, and 3) Eschelon Unfiled Agreement V - paragraph 3, the Commission required Qwest to give the same rebates to the disfavored CLECs for services that the disfavored CLECs purchased from Qwest during the time that the rebate arrangements were available to Eschelon. See Order Paragraphs 3b, 3c, and 3d, respectively.

The Commission provided that the $25,955,000 penalty would be stayed if Qwest agreed to comply with the restitutional remedies and would abate completely upon completion of the restitutional remedies. Order Paragraph 5.

Finally, due to the benefit received by the specially favored CLECs, Eschelon and McLeod, the Commission did not allow them to receive credits or payments in connection with the backward looking remedies and partially disqualified them from the forward looking discount, as described in detail in Order Paragraph 6.

II. QWEST'S PETITION FOR RECONSIDERATION

A. Qwest's Objections to the Monetary Penalty

Qwest acknowledged that the Commission discusses the statutory factors appearing in Minn. Stat. § 237.462, but objected that the Commission did not adequately review and apply these statutory factors during the meeting. While it is not incumbent upon decision-makers to articulate and discuss during their deliberations every legally relevant factor, the Commission notes that most of the factors were in fact specifically discussed: seriousness of the infractions, intentionality, Qwest's history of past violations, the number of the violations, and the economic benefit of the violations to Qwest. Clearly the Commission's deliberations were informed by and occurred within the conceptual framework of Minn. Stat. § 237.462.[2]

---

[2] Qwest suggested that the Commission's purpose in setting the penalty amount was to provide an incentive for Qwest to seek a stay of that penalty by accepting the restitutional remedies crafted by the Commission and that such a purpose exceeded the Commission's statutory authority. While the Commission's Order shows that the penalty amount was fully justified by consideration of the specific statutory factors discussed therein, the Commission does not concede Qwest's premise that considering what would motivate Qwest to perform a reasonable set of restitutional measures is precluded by the statute. The statute clearly acknowledges the existence of "other factors that justice may require, as determined by the Commission." Minn. Stat. § 237.462, Subd. 2(9). Considering what level of fine (subject to stay) would motivate Qwest to remedy its knowing and intentional discrimination against the disfavored CLECs and to restore the damaged competitive marketplace in Minnesota by giving the disfavored CLECs approximately the same deal Qwest gave the favored CLECs would surely be such a factor. In any event, since the Commission has on its own motion eliminated the stay provision in this Order, Qwest's allegation is now moot.

The Commission's Order is its official decision. Like a court, the Commission issues an Order based on the entire record before it and it is in light of that record that the Commission's Order is to be evaluated and any insufficiency shown. In its Order, the Commission cited evidence in the record for each statutory factor and gave those factors appropriate weight and due discussion in reaching its conclusions. Order, pages 7 - 19.

B. Qwest's Objections to What It Called "Opt-in Remedies"

In its petition for reconsideration, Qwest misconstrued the Commission's restitutional remedies (secret provision availability, returns/discounts, and rebates, as described above) as "opt-in remedies" subject to Section 251 and 252 of the Federal Telecommunications Act of 1996.

Further, Qwest incorrectly asserted in its petition at page 5 that the Commission's Order described the restitutional remedies as "opt-in remedies" subject to Section 251 and 252 of the Federal Telecommunications Act of 1996. In fact, the Order's only reference to "opt-in" was in recounting Qwest's proposal to allow CLECs to opt-in to 21 of the 26 initially unfiled provisions. Order at page 14. The Commission clearly rejected Qwest's opt-in proposal and chose instead to make all 26 provisions available to the disfavored CLECs as part of a "restitutional remedy." Order at page 14.

The Commission's other restitutional remedies (the returns/discounts provided in Order Paragraphs 3a and 4 and the rebates directed under Order Paragraphs 3b, 3c, and 3d) are clearly authorized under state law (see discussion below) and are not constrained by the "opt-in" provisions of Sections 251 and 252. The Commission's Order is clear that Order Paragraphs 2, 3, and 4 were not creating opt-in opportunities under federal law, but were providing remedies under the Commission's state authority to remediate the effects of Qwest's discrimination. The Commission expressed the state law basis for its prescription for appropriate remediation by prefacing its list of appropriate remedial measures (secret agreement availability, return/discounts, and rebates) as follows:

> Local competitors and local competition that have been unquestionably harmed by Qwest's anti-competitive and discriminatory actions must be restored to the greatest extent feasible. While the Commission cannot turn back the clock and let competition proceed as it would have absent this anti-competitive activity, the Commission can take realistic steps in that direction as part of the Commission's authority to remediate the effects of Qwest's discrimination. [Footnote citing Minnesota's anti-discrimination statutes omitted.] Order at page 19.

Because Qwest misconstrued the Commission's remedies as "opt-in" remedies under Sections 251 and 252, Qwest's objections along those lines are without merit.

C. Qwest's Denial That the Commission Has Authority Under State Law to Remediate the Effects of Qwest's Knowing and Intentional Violations of State Laws Prohibiting Anti-Competitive and Discriminatory Behavior

Qwest alleged that neither federal nor state law authorizes the remedies contained in the Order.

Minnesota telecommunications statutes, however, contain two broad grants of authority to the Commission to punish and rectify violation of the state's telecommunications laws. The Commission's authority to correct Qwest's knowing and intentional discrimination against certain CLECs and their customers and the resulting injury to the competitive market in Minnesota is well grounded in these statutes.

1. The Competitive Enforcement Statutes: Minn. Stat. §§ 237.461 and 237.462

Minn. Stat. § 237.461, Subd. 1 states:

> This chapter . . . may be enforced by any one or combination of: criminal prosecution, action to recover civil penalties, injunction, action to compel performance, <u>and other appropriate action</u>. (Emphasis added.)

And Minn. Stat. § 237.462, Subd. 9 states in relevant part:

> The payment of a penalty does not preclude the use of <u>other enforcement provisions</u>, under which penalties are not assessed, in connection with the violation or violations for which the penalty was assessed. (Emphasis added.)

The restitutional remedies adopted by the Commission aim to correct the wrong done by Qwest when it knowingly and intentionally violated specific provisions of Chapter 237 and federal law. These remedies give to the disfavored CLECs, to the greatest extent prudent and feasible, the benefits that Qwest denied to those CLECs and instead secretly gave to certain favored CLECs. As such, these remedies are exactly the kind of "... other appropriate action" authorized by the statute.

2. The Complaint Statute: Minn. Stat. § 237.081

Minn. Stat. § 237.081, Subd. 4 authorizes the Commission to rectify Qwest's discrimination by any Order that is just and reasonable. The remedial discretion granted includes authority to set just and reasonable rates and prices:

> Whenever the commission finds, after a proceeding under subdivision 2, that (1) . . . , (2) that any rate, toll, tariff, charge, or schedule, or any regulation, measurement, practice, act, or omission affecting or relating to the production, transmission, delivery, or furnishing of telephone service or any service in connection with telephone service, is in any respect unreasonable, insufficient, or unjustly discriminatory, or (3) . . . , the commission shall make an order respecting the tariff, regulation, act, omission, practice, or service that is <u>just and reasonable</u> and, if applicable, shall establish <u>just and reasonable rates and prices</u>. (Emphasis added.)

The Commission's Order and the restitutional remedies contained therein, which included setting the rates and prices at which the disfavored CLECs may receive certain services for a reasonable length of time, sought to give those disfavored CLECs, to the greatest prudent feasible extent, the benefits that Qwest denied to those CLECs and instead gave to the favored CLECs. They are exactly the kind of Order and remedies that the statute authorizes.

Qwest relied on the Minnesota Supreme Court's decision in *Peoples Natural Gas Co. v. Minnesota PUC*, 369 NW2d 530 (Minn. 1985) to establish that the Commission has no authority to require a telecommunications company to issue a refund after engaging in discriminatory pricing. However, the authority at issue in *Peoples* was the Commission's prospective rate-making authority. By contrast, in the current context of a complaint brought under Minn. Stat. § 237.081, the Commission's statutory authority is much wider. Minn. Stat. § 237.081 authorizes the Commission, upon finding discrimination, to make an Order that is "just and reasonable", adding "and if applicable, [the Commission] shall establish just and reasonable rates." Rather than limiting the Commission's authority to setting rates and precluding authority to order third-party payments (the returns/discounts and rebates to the disfavored CLECs), Minn. Stat. § 237.081 grants the Commission broad authority to issue any Order that is "just and reasonable".

In short, the returns/discounts and rebates ordered in this Order are just and reasonable as required by Minn. Stat. § 237.081 for the following reasons:

- **Returns/discounts:** Minn. Stat. § 237.06 states: "All unreasonable . . . charges are hereby declared to be unlawful." The charges Qwest imposed on the disfavored CLECs in excess of what they charged the favored CLECs who received the ten percent discount are discriminatory and unreasonable and hence "unlawful" pursuant to Minn. Stat. § 237.06. Accordingly, it is just, reasonable, and consistent with equitable principles for the Commission to direct that Qwest return to the disfavored CLECs the unlawful amounts it has collected from them. Clearly, Qwest should return to the disfavored CLECs the amount it wrongfully and unlawfully obtained from them. An Order compelling Qwest to do so is a "just and reasonable" Order, as authorized by Minn. Stat. § 237.081.

- **Rebates[3]:** The amounts Qwest charged the disfavored CLECs for access and platform lines exceeded the net per-line amounts charged Eschelon (initial charge minus an applicable portion of the $2, $13, and $16 rebates) pursuant to secret unfiled agreements with Eschelon. The amounts Qwest charged the disfavored CLECs which exceeded the net amount it charged Eschelon are discriminatory and unreasonable and hence "unlawful" pursuant to Minn. Stat. § 237.06. Accordingly, it is just and reasonable for the Commission to direct that Qwest return to the disfavored CLECs the unlawful amounts it collected from them. By failing to give the disfavored CLECs the same per-line rebates it gave to Eschelon, Qwest is wrongfully retaining money (the unrebated amounts) from the disfavored CLECs.[4] The amounts wrongfully withheld from each CLEC should be disbursed to them. An Order compelling Qwest to do so meets the "just and reasonable" standard established in Minn. Stat. § 237.081.

---

[3] The rebates in question are: the $2 rebate per access line given to Eschelon pursuant to Eschelon V, paragraph 2; the $13 rebate per platform line pursuant to Eschelon IV, paragraph 2; and the $16 rebate per platform line pursuant to Eschelon V, paragraph 3.

[4] A process for determining that amount for each CLEC will be discussed in the following section and prescribed in this Order. Ordering Paragraphs 2, 3, and 4.

3. No Federal Preemption

Since the Commission draws authority for its remedies from state law rather than federal, the key consideration regarding federal law is **not** whether it authorizes the remedial measures adopted by the Commission, but whether it prohibits the Commission from using its state authority to address Qwest's knowing and intentional violations of Minnesota's statutes' prohibition of anti-competitive and discriminatory behavior.

Federal law clearly does not prevent the Commission from taking the measures, as closely defined in this Order, under state law. In fact, the federal act specifically authorizes the Commission to use state law and procedures in implementing the act. See, e.g. 47 U.S.C § 251(d)(3); 47 U.S.C. § 252(e)(3); and 47 U.S.C. § 253(b) which states:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis, and consistent with section 254 [universal service], requirements necessary to . . . protect the public safety and welfare . . . . .

And the FCC's Nine State Order[5], rather than preempting state action on unfiled agreements, suggested that states have broad authority to hear complaints, conduct investigations, and determine appropriate remedies under federal and state law. While specifically recognizing opt-in as an important mechanism to remedy discrimination, the FCC did not disapprove state Commissions exercising their remedial authority under state law in cases like the present one, i.e. where the Commission has before it a careful, thorough record demonstrating Qwest's knowing and intentional violation of federal law and state statutes prohibiting anti-competitive and discriminatory conduct.

In sum, Minnesota's complaint process (Minn. Stat. § 237.081) and remedial authority thereunder and Minnesota's enforcement statutes (Minn. Stat. §§ 237.461 and 237.462) authorize the Commission to impose reasonable consequences when Qwest does not conform to state law prohibiting anti-competitive and discriminatory conduct. The Commission's imposition of such reasonable consequences is not prohibited by the Federal Telecommunications Act of 1996.

III. COMMISSION'S RECONSIDERATION ON ITS OWN MOTION

The Commission will modify the restitutional remedies of its February 28, 2003 Order[6] on its own motion as follows.

A. Shortening the Look-Back Period of Paragraph 3a

Regarding, Order Paragraph 3a, the Commission will reduce the length of the look-back period from 24 to 18 months. The disfavored CLECs will be entitled to a ten percent discount on all Minnesota products and services purchased from Qwest during the 18 month period starting November 15, 2000 and ending May 15, 2002.

---

[5] Qwest 271 Order, FCC WC Docket No. 02-314 (Dec.20, 2003).

[6] Order Paragraphs 2, 3a - 3d, 4, 5, and 6.

7

The 18 month period is reasonable and conservative because Qwest itself has acknowledged that the McLeod ten percent discount agreement was in effect for 18 months (January 1, 2001 through June 30, 2002).[7]

Further, the November 15, 2000 start date for the period is reasonable because as the ALJ found and Qwest has acknowledged, Eschelon's ten percent discount agreement (Eschelon IV) began on November 15, 2000.[8]

Finally, the designated stop date, May 15, 2002, results from a mathematical calculation, i.e. 18 months after the selected start date, November 15, 2000.

B. Specifically Including Offsets in the Calculation of Rebates Required by Order Paragraphs 3b, 3c, and 3d

Regarding the rebate remedies provided by Order Paragraphs 3b, 3c, and 3d, the Commission will clarify how the amounts that Qwest is to rebate to the disfavored CLECs will be calculated. The various per line rebates ($2, $13, and $16) given to Eschelon compensated Eschelon for Qwest's failure to provide billing information Eschelon needed to bill its customers.

Since the disfavored CLECs may nevertheless have been able to bill their customers for some access line and platform lines during the periods in question, it is appropriate that rebates should not be automatically given for each access and platform line, but that offset should be made for any access line and platform line charges actually billed by the disfavored CLECs during this time period. Qwest will have the burden to show the reasonableness of the amounts it rebates, but Qwest and the CLECs will need to exchange relevant billing information to calculate the net rebate amounts due the disfavored CLECs. Accordingly, the Commission will establish a reasonable timetable for the calculation, payment, and report on these rebates. See Order Paragraphs 2, 3, and 4.

C. Eliminating the Looking Forward Discount Provided by Order Paragraph 4

The 24-month forward-looking discount period provided by Order Paragraph 4 will be eliminated.

The justification for the forward-looking discount was the Commission's understanding that the sizeable payments that Qwest paid to Eschelon and McLeod when their secret ten percent discount agreements were terminated essentially gave Eschelon and McLeod the monetary benefit of the remaining term of their agreements. Based on this understanding, it was reasonable to require Qwest to give the disfavored CLECs the ten percent discount for a period of time approximately equal to what remained on the Eschelon and McLeod agreements when they were terminated. This would have essentially evened things up for the disfavored CLECs.

In their petitions for reconsideration, however, Eschelon and McLeod stated that the payments they received at the termination of their secret ten percent discount agreements were for the most part not to compensate them for the future value of their agreements but were to settle other

[7] Qwest's Motion for Reconsideration, page 22.

[8] Ibid at page 22.

8

unrelated claims they had against Qwest. No party has submitted evidence which disputes Eschelon and McLeod's statements about the nature of the end-of-agreement payments they received. The Commission is unable to conclude on the basis of the record that their claims are erroneous and is unwilling to prolong this proceeding by initiating a contested case proceeding to scrutinize these claims further.

Due to Eschelon's and McLeod's submissions on reconsideration, the Commission finds that the record no longer provides a clearly defined equitable basis for the forward-looking remedy imposed by Order Paragraph 4. The Commission will, therefore, eliminate the forward-looking ten percent discount remedy.

D. Excluding Interstate Access Services From the Look Back Provisions of Paragraph 3a

Also with respect to Paragraph 3a, the February 28, 2003 Order will be modified to exclude interstate access services from the group of services for which the ten percent discount will be available to the disfavored CLECs.

There is a strong equitable claim that the disfavored CLECs should receive the ten percent discount on the interstate access services that they purchased during the 18 month time period delineated in the previous section because the favored CLECs (Eschelon and McLeod) received such a discount on the interstate access services that they purchased. So giving the disfavored CLECs a similar ten percent discount on the interstate access services they purchased during the designated period would be a common sense step towards restoring balance and treating all CLECs equally.

Qwest did not dispute that it gave the ten percent discount on interstate access services purchased by Eschelon and McLeod, but argued strenuously that the Commission is preempted by federal law from ordering Qwest to give the same ten percent discount on interstate access services to the disfavored CLECs. Qwest asserted that a recent federal District Court decision supported its contention.[9] AT&T responded that federal law does not preempt the Commission from this action and argued that under established standards the Commission retains full power to remedy the harm caused by Qwest. AT&T argued that the cited District Court decision does not support Qwest's position.

The Commission will remove interstate access purchases from the group of services covered by the discount remedy, taking the same conservative approach taken above on the look-back period and on the forward-looking discounts. If competition is to thrive in the evolving telecommunications market, competitors must be able to move forward with certainty. At this point, immediate relief in known quantities is more valuable than the possibility of later relief in greater but unknown quantities. Litigating the preemption issue at this point would not be in the best interests of CLECs, consumers, or the telecommunications marketplace.

---

[9] *Qwest Corp. v. Scott*, No. 02-3563 ADM/AJB, 2003 WL 79054 (D. Minn. Jan. 8, 2003).

E. Eliminating the Provision Disqualifying Eschelon and McLeod From the Now Eliminated Forward Looking Discount Period

Since Order Paragraph 4, which provided the forward-looking ten percent discount remedy, will be eliminated, the second sentence of Order Paragraph 6 which refers to the forward-looking ten percent discount remedy will be deleted.

F. Eliminating Opportunity to Stay Monetary Penalty

Minn. Stat. § 237.462, Subd. 3 authorizes the Commission to impose a monetary penalty when the record establishes by a preponderance of the evidence that the penalty is justified based on the factors identified in subdivision 2 of the statute.

The Commission was convinced when it issued the February 28, 2003 Order and it is convinced now that the record surrounding Qwest's knowing and intentional anti-competitive and discriminatory behavior in this matter fully justifies the $25,955,000 monetary penalty under Minn. Stat. § 237.462 for the reasons set forth in the Commission's February 28, 2003 Order[10].

In Order Paragraph 5 of the February 28, 2003 Order, however, the Commission exercised its discretion to offer Qwest the opportunity to obtain a temporary stay of the monetary penalty ($25,955,000) if it undertook to comply with the restitutional remedies prescribed in the Order and to obtain a permanent stay of the monetary penalty upon complete compliance with those remedies. In light of the changes in the restitutional remedies made in this Order, the stay provisions are no longer appropriate.

This case has presented the Commission a unique challenge and opportunity. After holding lengthy evidentiary hearings in this case, the Administrative Law Judge (ALJ) found and the Commission has confirmed that Qwest knowingly and intentionally engaged in discriminatory and anti-competitive conduct against the disfavored CLECs, that this conduct had injured both Qwest's competitors and the Minnesota telecommunications market. The ALJ found, and the Commission agrees, that penalties were appropriate under Minn. Stat. § 237.462. The ALJ also noted, however, that the case presented an opportunity to make significant progress toward a fully competitive marketplace by rejecting a purely punitive approach and applying creative solutions. He stated:

> This unfiled agreements case, when coupled with the Qwest 271 case, presents a unique opportunity for the Commission to be creative in fashioning a remedy that will operate in the best interests of Minnesota ratepayers and telephone user in the future......
>
> The Administrative Law judge does not have any "total package" solutions to suggest to the Commission. Instead, he hopes the parties will be able to offer suggestions to the Commission and that ultimately the Commission is able to create a meaningful package that will benefit local competition in the long term throughout Minnesota.[11]

---

[10] See Order, pages 7-19.

[11] ALJ's *Findings of Fact, Conclusions and Recommendations*, page 54.

The February 28 Order was an attempt to forge the kind of creative solution recommended by the Administrative Law Judge within the parameters of the law. It was crafted in the hope that its combination of monetary penalties, restitutional remedies, and option to stay the penalties would bring immediate relief to competitors and long-term benefit to the marketplace. It now seems likely that the Order's approach would instead bring protracted litigation.

Accordingly, the Commission will take a more conventional approach and adopt changes that render this Order considerably less creative. As specifically discussed above, the Commission will 1) shorten the look-back ten percent discount period to 18 months; 2) eliminate the looking-forward ten percent discount; and 3) exempt interstate access charges from the look-back ten percent discount.

At the same time, however, since these changes significantly pare back the restitutional remedies ordered in the February 28, 2003 Order, it is no longer equitable to allow Qwest to escape responsibility for the justly imposed monetary penalty by simply complying with what remains of the restitutional remedies. Moreover, retaining the stay option in these circumstances would undermine the Order's deterrent effect on future knowing and intentional discriminatory and anti-competitive conduct. Accordingly, the option to stay the monetary penalty provided in the February 28, 2003 Order will be removed.

IV. PETITIONS TO RECONSIDER FILED BY ESCHELON AND MCLEOD

Since the Commission will eliminate the forward-looking ten percent discount remedial measure[12] as discussed above in Part III, McLeod's objections to being determined ineligible in whole or in part[13] for that remedy are moot.

In addition, the Commission finds that McLeod's objection to being excluded from the backward-looking measures are not persuasive, particularly in light of the Commission having reduced the time period of the look-back period from 24 to 18 months.

The Commission clarifies that no part of the Commission's February 28, 2003 Order or the current Order should be viewed as a penalty against either company for their involvement in the unfiled agreements. This is a complaint proceeding brought by the Department against Qwest pursuant to Minn. Stat. § 237.462. The proceeding and the Commission's Orders have properly focused on the actions of Qwest and any remedies ordered by that Order are aimed at restoring the CLECs that Qwest discriminated against. To the extent that Eschelon and McLeod were not similarly disfavored, there is no need to give them the remedies given the other CLECs. Understood in this context, then, any ineligibility they have for the remedies given the disfavored CLECs is not a penalty to Eschelon and McLeod but simply in recognition that they do not need these remedies to be fairly treated.

---

[12] The forward-looking discount remedy was provided in Order Paragraph 4 of the February 28, 2003 Order, at page 21.

[13] Order Paragraph 6 of the February 28, 2003 Order stated that Eschelon and McLeod would not be eligible for their forward-looking ten percent discount remedy until they had purchased from Qwest services whose ten percent discounts would equal the amount of the amounts received from Qwest as compensation for the value of their terminated agreements. Order at page 21.

ORDER

1. On its own motion, the Commission has reconsidered the February 28, 2003 Order and modifies that Order as follows:

   a. modifies Order Paragraph 3a:

      3a. Qwest shall give, either in cash or by credit at the CLEC's choice, the equivalent of a 10% discount on all Minnesota products and services, excluding interstate access services, that the CLEC purchased from Qwest between November 15, 2000 and ~~November 15, 2002~~ May 15, 2002. Services covered are those stated in Eschelon IV, Paragraph 3: all purchases made by Eschelon from Qwest, including but not limited to switched access fees and purchases of interconnection, UNEs , tariffed services, and other telecommunications services covered by the Act. This is the equivalent of giving them the benefit of the Eschelon IV price for a ~~24~~ 18 month period starting on November 15, the day the Eschelon IV agreement became effective.

   b. modifies Order Paragraphs 3b, 3c, and 3d as follows:

      3b. Qwest shall also give, in cash or by credit against future purchases at the affected CLEC's choice, \$2 per access line purchased during the time Eschelon V, paragraph 5 was in effect. The \$2 payment shall be offset by the amounts collected by the affected CLECs from Qwest for the terminating access services for which the payment was intended to apply. This is the equivalent of giving them the benefit of Eschelon V, paragraph 5.

      3c. For each month that Qwest did not provide accurate daily usage information to a CLEC (other than Eschelon) during the time that Eschelon IV, paragraph 2 was in effect, Qwest shall give that CLEC a \$13 credit for each platform line ordered by the CLEC during that time period. The \$13 payment shall be offset by the amounts billed by the affected CLECs for the originating and terminating access services for which the payment was intended to apply. Qwest shall have the burden of proof with respect to the appropriateness of any offset. This is the equivalent of giving them the benefit of Eschelon IV, paragraph 2.

      3d. For each month that Qwest did not provide accurate daily usage information to a CLEC (other than Eschelon) during the time that Eschelon V, paragraph 3 was in effect, Qwest shall give that CLEC a \$16 credit for each platform line ordered by the CLEC during that time period. The \$16 payment shall be offset by the amounts billed by the affected CLECs for the originating and terminating access services for which the payment was intended to apply. Qwest shall have the burden of proof with respect to the appropriateness of any offset. This is the equivalent of giving them the benefit of Eschelon V, paragraph 3.

c. deletes Order Paragraph 4:

~~4. Qwest shall give a 10% discount on all Qwest products and services provided in Minnesota to each Minnesota CLEC during a 24-month period commencing on the date of this Order. This is the equivalent of giving them the benefit of Eschelon IV, paragraph 5 except that the services for which the 10% discount is available under this Order is limited to services in Minnesota.~~

d. deletes Order Paragraph 5:

~~5. The monetary penalty assessed in Order Paragraph 1 above will be stayed if Qwest undertakes to comply with Order Paragraphs 2, 3a-d, and 4. The penalty shall be permanently stayed upon completed compliance with Order Paragraphs 2, 3a-d, and 4.~~

e. modifies Order Paragraph 6 as follows:

6. Eschelon and McLeod shall not be eligible for payments or credits under Order Paragraphs 3a-d. ~~And, in view of contract termination amounts received from Qwest as compensation for the value of their terminated agreements, they shall be ineligible for the 10% discount under Order Paragraph 4 until they have purchased from Qwest services whose 10% discounts (if given) equal the amount of any such payments.~~

2. Within **90 days** of this Order, Qwest shall inform each affected CLEC of the amount Qwest's records indicate the CLEC may be entitled to receive pursuant to Order Paragraphs 3b, 3c, and 3d, subject to offset as provided by those Paragraphs.

3. Within **90 days** of the date Qwest gives CLECs the information required in Order Paragraph 2, Qwest shall rebate to each CLEC the amount which the CLEC is actually entitled to receive after adjusting for any offsets attributable to the CLEC pursuant to Order Paragraphs 3b, 3c, and 3d.

4. Within 30 days of Qwest making the rebates required by Order Paragraph 3, Qwest shall file a report with the Commission on this activity.

5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

QWEST CORPORATION, a Colorado corporation, Plaintiff, v. LEROY KOPPENDRAYER, in his official capacity as Chairman of the Minnesota Public Utilities Commission; ELLEN GAVIN, in her official capacity as a member of the Minnesota Public Utilities Commission; R. MARSHALL JOHNSON, in his official capacity as a member of the Minnesota Public Utilities Commission; , PHYLLIS REHA, in her official capacity as a member of the Minnesota Public Utilities Commission; GREGORY SCOTT, in his official capacity as a member of the Minnesota Public Utilities Commission and THE MINNESOTA PUBLIC UTILITIES COMMISSION, Defendants.	Civil File No. 03-2492 DSD/SRN **COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF TO PREVENT ENFORCEMENT OF PUBLIC UTILITIES COMMISSION ORDERS**

COMPLAINT

Plaintiff, Qwest Corporation ("Qwest"), alleges as follows:

NATURE OF THE ACTION

This action challenges under the Federal Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. ("the Act"), and binding regulations of the Federal Communications Commission ("FCC") orders of the Minnesota Public Utilities Commission and its individual members in their official capacities (collectively, "Minnesota Commission" or

14

Rec'd MJ 4/23/03 4:0?

"Commission") establishing the rates Qwest may charge its competitors when they lease facilities and elements of Qwest's local telephone network in Minnesota to provide competing local telephone service to their customers. *See In the Matter of the Commission's Review and Investigation of Certain Unbundled Network Element Prices of Qwest*, Docket No. P-442,421, 3012/M-01-1916, Order Urging Consolidation of the UNE-P Docket With the 271 Cost Docket, issued March 18, 2002 ("March 18, 2002 Order") (Exhibit A hereto); *In the Matter of the Commission's Review and Investigation of Certain Unbundled Network Element Prices of Qwest*, Docket No. P-421, C1-01-1375, Order Establishing Interim Rates, issued April 4, 2002 ("April 4, 2002 Order") (Exhibit B, hereto); *In the Matter of the Commission's Review and Investigation of Qwest's Unbundled Network Element Prices*, Docket No. P-421, C1-01-1375, Findings of Fact, Conclusions of Law and Recommendation, August 5, 2002 ("ALJ Recommendation") (Exhibit C, hereto); In *the Matter of the Commission's Review and Investigation of Qwest's Unbundled Network Element Prices*, Docket Nos. P-421/C1-01-1375, P-442, 421, 3012/M01-1916, Order Setting Prices and Establishing Procedural Schedule, issued October 2, 2002 ("October 2, 2002 Order") (Exhibit D, hereto); *In the Matter of the Commission's Review and Investigation of Qwest's Unbundled Network Element Prices*, Docket No. P-421, C1-01-1375, Order Denying Reconsideration, issued November 26, 2002 ("November 26, 2002 Order") (Exhibit E, hereto); *In the Matter of the Commission's Review and Investigation of Qwest's Unbundled Network Element Prices*, Docket No. P-421, C1-01-1375, Order Accepting Filing and Opening New Docket, issued March 24, 2003 ("March 24, 2003 Order") (Exhibit F, hereto). As discussed below, the Commission's rates inadequately compensate Qwest for the forward-looking costs of the network elements it must lease to those competitors, and they thus violate the Act and governing FCC regulations. As a party "aggrieved" by the Commission's orders, Qwest now brings this action for judicial review under the Act. *See* 47 U.S.C. § 252(e)(6) ("In any case in which a State commission makes a determination under this section [47 U.S.C. § 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 [47 U.S.C. § 251] and this section [47 U.S.C. § 252]").

JURISDICTION AND VENUE

1. This action arises under 47 U.S.C. §§ 251-252, and 47 C.F.R. §§ 51.501-51.513. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1367, 2201, and 2202 and 47 U.S.C. § 252(e)(6).

2. Venue is proper in this Court under 28 U.S.C. §§ 1391(a)(1) and (a)(2) because one or more Defendants reside in this District and a substantial part of the events giving rise to the claims occurred in this District.

THE PARTIES

3. Qwest Corporation is a Colorado corporation with its principal place of business at 1801 California Street, Denver, Colorado 80202. Qwest is an incumbent local exchange carrier ("incumbent LEC" or "ILEC") as defined in 47 U.S.C. § 251(h) that provides local telephone service in Minnesota and 13 other mid-western and western states.

4. Defendant Minnesota Commission is a governmental body organized under the laws of the State of Minnesota with authority to regulate telecommunications carriers providing intrastate service in Minnesota. The Commission is headquartered at 121 7th Place

E., Suite 350, St. Paul, Minnesota 55101-2147. The Commission is a "State commission" within the meaning of 47 U.S.C. §§ 153(41), 251 and 252.

5. Defendants LeRoy Koppendrayer, Ellen Gavin, R. Marshall Johnson, Phyllis Reha, and Gregory Scott are the current members of the Commission and are named in their official capacities for declaratory and injunctive relief only.

STATEMENT OF FACTS

A. Description of the Telecommunications Act of 1996

6. The Telecommunications Act of 1996, an amendment to the Communications Act of 1934, 47 U.S.C. § 151 *et. seq.*, was enacted to facilitate greater competition, including facilities-based competition, in telecommunications markets.[1] As implemented by the FCC, the 1996 Act entitles competitive LECs ("CLECs") to lease facilities ("unbundled network elements" or "UNEs") of ILECs as one among several means of providing competing local telephone services to residential and business customers. *See* 47 U.S.C. §§ 251(c)(3), (d)(2).

7. The rates, terms and conditions for leasing UNEs are established through agreements ("interconnection agreements") between ILECs and CLECs. Congress intended that interconnection agreements would be reached through negotiation between the parties. If negotiations fail to resolve all disputed issues under the Act, a party may seek compulsory arbitration under Section 252(b) before a state commission, such as the Minnesota Commission. The state commission has the option of resolving the parties' disputes or

[1] "Facilities-based" competition refers to competition between telecommunications carriers using their own networks, in contrast to competition between carriers that use the same network facilities, which is limited largely to salesmanship. This case involves the prices paid by carriers who provide competing service over Qwest's network facilities.

having the FCC step in and resolve them in its place. Because multiple CLECs in a given state seek to arbitrate interconnection agreements with ILECs, it is not uncommon for a state commission to resolve certain issues in multi-party proceedings in lieu of individual arbitrations.

8. Several major long distance companies, including AT&T and WorldCom, are also CLECs. AT&T and WorldCom often lease from ILECs all facilities needed to provide local telephone service. Thus, without building any local network facilities of their own, these companies essentially "resell" the ILEC's local service to retail customers, sometimes bundling that service with their long distance service.

9. Among the most important issues arising under the 1996 Act are the rates that these CLECs must pay to compensate ILECs for the use of UNEs. The rates that CLECs must pay ILECs fall into two general categories: recurring and non-recurring. *See* 47 C.F.R. § 51.507(a), (b). An ILEC recovers the costs of capital investments, as well as certain other costs incurred in providing UNEs, through monthly "recurring" charges over a multi-year period. In contrast, an ILEC may recover up front through a one-time "non-recurring" charge certain labor related and other costs it incurs when it processes a CLEC order for a network element or change in service.

10. The Act provides that UNE rates must be set on the basis of the element's "cost." 47 U.S.C. § 252(d)(1). Pursuant to its authority to adopt regulations implementing the Act (*see* 47 U.S.C. §§ 201(b), 251(d)(1)), the FCC on August 8, 1996 issued its First Report and Order adopting regulations under the Act's local competition provisions. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 ¶ 685 (1996) ("*Local Competition Order*"); 47 C.F.R. §§ 51.501-51.513.

19

In that order, the FCC adopted a cost methodology, "total element long run incremental cost" or "TELRIC," that states are required to use in setting UNE rates in the event negotiations between ILECs and CLECs are unsuccessful. TELRIC is a "forward-looking" (or "replacement") cost methodology which, generally speaking, measures the cost of a hypothetical "reconstructed local network." *See Local Competition Order,* ¶¶ 674-740.

11. As the FCC recently explained, "[t]he essential objective of TELRIC "is to determine what it would cost, in *today's market*, to replace the functions of [a network] asset that makes it useful," taking into account "the most basic geographical design of the existing network" and the rest of the world external to that network. *See* Brief for Petitioners FCC and United States at 6, 9, *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646 (2002) (No. 00-511 and consolidated cases) ("FCC Supreme Court Brief") (emphasis added). In particular, "the TELRIC of an element should be based on the use of the most efficient telecommunications technology currently available and lowest cost network configuration, given the existing location of the ILEC's wire centers [*i.e.*, switches]." 47 C.F.R. §51.505(b)(1). To derive rates, TELRIC is divided by the units of demand (typically determined by the number of telephone access lines in the network) served by the replacement network, including the demand of the ILEC's retail customers and the demand of the CLECs' retail customers.

12. The "current availability" of facilities is integral to the basic purpose of TELRIC, which is to "replicate[], to the extent possible, the conditions of a competitive market." *Local Competition Order* ¶ 679. By replicating those conditions, TELRIC is meant to give CLECs appropriate price signals about when it would be efficient, and when it is inefficient, for the CLEC to build its own facilities in lieu of leasing the ILEC's existing

19

capacity. *See id.* ¶ 620, ¶¶ 683-85. The FCC has emphasized the importance of facilities-based competition by CLECs as a more robust competitive alternative to complete reliance on the ILEC's facilities. *See, e.g.*, Fourth Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 15435 ¶ 4 (2001) ("Through its experience over the last five years in implementing the 1996 Act, the Commission has learned that only by encouraging competitive LECs to build their own facilities or migrate toward facilities-based entry will real and long-lasting competition take root in the local market"); *see also* Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-339, et al., FCC 01-361, (adopted Dec. 12, 2001), Separate Statement of Chairman Michael K. Powell at 2 (stressing FCC's "ongoing commitment to the promotion of facilities-based competition").

13. Thus, in applying TELRIC, it is critical to set UNE prices, as the FCC requires, on the basis of "currently available" technology and current constraints in the rest of the world outside the network. To do otherwise would impermissibly distort the price signals TELRIC is designed to send and undermine a CLEC's incentives to invest in facilities of its own. No carrier would ever build facilities at today's market rates, with the constraints of today's world, if it could instead lease facilities at erroneously low regulated rates reflecting the lower costs of yesterday or tomorrow.

B. History of the Cost Docket Proceeding

14. In December 1996, the Commission commenced a cost docket proceeding to determine the UNE and other rates that Qwest's predecessor, U S WEST, could charge Minnesota CLECs in the absence of negotiated rates. Thereafter, the Minnesota Office of

20

Administrative Hearings ("OAH") conducted hearings in the docket. On May 3, 1999, the Commission adopted the Administrative Law Judge's report and ordered U S WEST to make a compliance filing in accordance with the Commission's order. The Commission's Order found that the ALJs' recommended rates for unbundled loops, unbundled switching and other UNEs complied with the Act and the FCC's TELRIC regulations.

15. In 2001, the Commission opened a docket for the purpose of establishing rates for those UNEs that had not been addressed in the Commission's 1998 cost docket proceeding. On December 21, 2001, AT&T Communications of the Midwest, Inc. ("AT&T") and WorldCom, Inc. ("WorldCom"), requested the Commission to review certain UNE rates established in the 1998 cost docket. Specifically, these CLECs requested that the Commission review and revise on a prospective basis the rates for the UNEs that make up what is known as the "UNE platform" – all of the UNEs that permit a CLEC to provide competing local telephone service to an end user without reliance on the CLEC's own facilities. The UNEs in the UNE platform include but are not limited to the loop (the telephone lines connecting a customer's house or business to the telephone company's switch), switching, and shared transport (carrying traffic between switches). AT&T and WorldCom argued that costs of these UNEs had declined since the last docket, and that rates should therefore be reduced on a prospective basis at the conclusion of the new docket. Qwest requested that the Commission review non-recurring and other charges established in the 1998 cost docket, and argued that the models and inputs the Commission had used were no longer accurate, and that the non-recurring and other charges for which Qwest sought review should be increased on a prospective basis.

16. The Commission agreed to the request of AT&T and WorldCom that it review the 1998 rates for UNE platform element for which these CLECs sought reductions, and on February 13, 2002, the Commission referred the matter to the OAH for hearings. The Commission, however, denied Qwest's request to review the 1998 non-recurring and other charges for which Qwest sought increases. *See* Exhibit A, hereto.

17. On March 18, 2002, the OAH consolidated the UNE platform rate proceeding with the other rate proceeding in PUC Docket No. P-421/C1-01-1375, hereinafter referred to as "Docket 1375."

18. On April 4, 2002, the Commission issued an order providing that the UNE rates it intended to adopt at the conclusion of Docket 1375 would replace the UNE rates it had approved in the 1998 cost docket proceeding. *See* Exhibit B, hereto. The Commission's order further provided that the new rates would apply to CLEC purchases of UNEs commencing April 4, 2002, without regard to the rates and terms set forth in the interconnection agreements pursuant to which such purchases were made, and without regard to whether the PUC had previously approved the rates under TELRIC. To the extent the rates paid by CLECs pursuant to their interconnection agreements with Qwest for purchases on or after April 4, 2002 differed from the rates adopted at the conclusion of Docket 1375, the PUC ordered retroactive adjustments, also known as "true-ups."

19. The OAH held hearings in Docket 1375 on May 13-17, 2002, and May 20-23, 2002, in which Qwest, interested CLECs, and the Minnesota Department of Commerce presented testimony and other evidence. Two ALJs from the OAH presided over the hearings.

20. On August 2, 2002, the ALJs issued their Findings of Fact, Conclusions of Law, and Recommendation in Docket 1375. *See* Exhibit C, hereto. The ALJs recommended the adoption of a cost model (the "HAI Model") developed on behalf of and paid for by AT&T and WorldCom for use in UNE rate proceedings be used to determine UNE costs in Docket 1375. The ALJs also recommended that the Commission adopt certain non-recurring charges for orders and activities for which it had not adopted such charges in its 1998 cost docket. Several parties, including Qwest, filed exceptions to the *ALJs' Findings* and submitted replies to each others' exceptions.

21. On September 5, 2002, the Commission held oral argument on the *ALJs' Findings* and the parties' exceptions to those findings. On October 2, 2002, the Commission issued an Order Setting Prices and Establishing Procedural Schedule. *See* Exhibit D, hereto . Several parties, including Qwest, filed petitions for reconsideration of the Commission's *Cost Docket Order* and submitted replies to each others' petitions.

22. On November 21, 2002, the Commission held oral argument on the parties' petitions for reconsideration of the *Cost Docket Order.* On November 26, 2002, the Commission issued its *Order Denying Reconsideration. See* Exhibit E, hereto. In the order, the Commission denied all petitions for reconsideration and affirmed the October 2, 2002 Order.

23. In the November 26, 2002 Order, the Commission directed the parties to submit within 21 days a full schedule of rates reflecting the relevant Commission determinations in the October 2, 2002 Order. The Commission granted the parties extensions of time to submit such a filing, and on February 18, 2003, Qwest submitted the parties' compliance filing.

24. On March 24, 2003, the Commission issued its Order Accepting Compliance Filing, which established the rates that Qwest could charge CLECs for the UNEs at issue in Docket 1375. See Exhibit F, hereto.

ERRORS IN THE COMMISSION'S DETERMINATIONS IN DOCKET 1375

25. In passing the Act, Congress took the extraordinary step of requiring ILECs to provide their most valuable assets -- their telecommunications networks -- to other carriers for use in competing against the ILECs. An essential component of the bargain that Congress struck in imposing this novel obligation is the requirement that incumbent LECs recover the costs they incur to provide CLECs access to their networks. Rates that do not meet this standard and the FCC's TELRIC pricing principles do not merely violate Congress' compensation requirement, but they also seriously undermine the Act's fundamental objective of creating facilities-based competition.

26. As discussed below, the rates resulting from the Commission's determinations in Docket 1375, including the *Cost Docket Order,* violate Congress' command that ILECs be compensated for the costs of allowing competitors to use their networks and that rates send the correct signals to new entrants regarding whether to build facilities or lease them from the ILECs. The Commission's orders in Docket 1375 produce rates that, in most cases, are the lowest or among the lowest in Qwest's 14-state serving territory. The rates violate basic TELRIC principles and also are without evidentiary support. As a result, the Commission's orders produce rates that deny to Qwest the compensation to which it is entitled under the Act. Further, the below-cost rates seriously undermine the prospect for genuine, facilities-based competition in Minnesota.

27. Under the 1996 Act, rates and other terms that apply to purchases of UNEs by CLECs from ILECs are governed exclusively through interconnection agreements approved by the state commission, or a Statement of Generally Available Terms ("SGAT") filed by an ILEC and approved or allowed to take effect by the state commission. See 47 U.S.C. 252(a), (b), (f). A state commission may not order that different rates apply during the term of the agreement, except as provided in "change of law" or other provisions of the agreement. Further, unless authorized by the parties' agreement, a state commission's order that different rates replace "retrospectively" (*i.e.*, applied to purchases occurring prior to their adoption) rates that had previously been approved by the commission would violate the well-settled rule against "retroactive ratemaking."

A. Effectiveness of New Rates

28. Qwest has entered into interconnection agreements with CLECs in Minnesota that have been approved by the Commission. These agreements are the exclusive source of the rates, terms and other conditions applicable to CLEC purchases of UNEs from Qwest during the term of the agreement. Prior and subsequent to April 4, 2002, Qwest sold UNEs to CLECs pursuant to Commission-approved interconnection agreements in effect on the date of purchase.

29. In its 1998 cost docket, the Commission adopted rates for many UNEs, including but not limited to loops, switching and shared transport, and found them to be consistent with the Act and the FCC's TELRIC rules. None of the orders issued by the Commission in its 1998 cost docket provided that those rates would be replaced for transactions occurring prior to the adoption of new rates. .

30. The Commission's April 4, 2002 Order in Docket 1375 purports to require that the rates adopted at the conclusion of the Docket would apply to UNE purchases by CLECs from Qwest on and after April 4, 2002, even if the application of the new rates to such purchases would be inconsistent with Commission-approved interconnection agreements in effect on the dates of such purchases. The Commission did not adopt the new rates in Docket 1375 until March 24, 2003, when it issued its order adopting compliance filing.

31. By purporting to require that the Docket 1375 rates apply to all UNE purchases on or after April 4, 2002, regardless of the rates and terms of the parties' interconnection agreements, the Commission has "bypass[ed] and ignore[d"] the "comprehensive" and "exclusive process" provided by Congress for establishing the terms of interconnection, including those applicable to UNE purchases, in violation of the Act. *See Verizon North v. Strand*, 309 F.2d 935, 941 (6th Cir. 2002). By purporting to require that the Docket 1375 rates replace on a retrospective basis back to April 4, 2002 the rates that the Commission had adopted and found lawful in its 1998 cost docket, the Commission has violated the rule against retroactivity, "a cardinal principal of ratemaking." *City of Piqua v. FERC*, 610 F.2d 950, 955 (D.C. Cir. 1979).

B. Refusal to Review and Revise Other UNE Rates

32. In Docket 1375, the Commission agreed to review and if appropriate revise some but not all of the UNE rates it had established in its 1998 cost docket. Specifically, the Commission agreed to review and revise *each and every* rate for which review was sought by CLECs, but refused to review and revise *any* of the rates for which review was sought by Qwest.

26

33. In Docket 1375, the Commission elected to determine UNE rates in a single, multi-party proceeding, in lieu of separate, individual arbitrations. Accordingly, the Commission was obligated to abide by the Act's requirements pertaining to arbitrations of interconnection agreements, including the requirement that the Commission resolve "any open issue." 47 U.S.C. § 252(b)(1). The Commission's refusal to review and, if appropriate, revise the UNE rates for which review was sought by Qwest violated the Act's requirement that it resolve "any open issues," and is also arbitrary and capricious, especially in light of the Commission's ruling on retroactivity. *See* ¶¶ 29-32, *supra*.

C. Errors in Determining the Costs of General Support Assets

34. "General support assets" is a category of assets that includes office equipment, office furniture, trucks, tools, and general purpose computers. The costs of general support assets are recovered in charges for loops, switches, shared transport and other UNEs. To determine the costs of general support assets that would be recovered in the charges for these UNEs, the ALJs assigned to Docket 1375 recommended, and the Commission adopted, the HAI cost model developed on behalf of and paid for by AT&T and WorldCom. After estimating the costs for general support assets that would be incurred by an efficient provider of UNEs, the HAI model further reduces these costs by applying a 50% "allocator."

35. The Commission justified the 50% allocator as necessary to ensure that Qwest's retail operations bore their share of costs for general support assets. Under the FCC's TELRIC rules, however, the replacement network is assumed to serve all retail demand in the ILEC's service territory, *including* the portion of that demand served by the ILEC (as opposed to CLECs). The costs to build, maintain and operate the replacement network are spread over all demand, including the demand of CLEC retail customers and

27

ILEC retail customers, to produce a per unit rate. Qwest's retail operations thus bear an amount of those costs, including those for general support assets, in proportion to the retail demand they serve. CLECs pay only those costs associated with the proportion of the relevant demand they serve. By applying a further 50% allocator, however, the Commission's order effectively makes Qwest pay a disproportionate share of the costs of general support assets, in violation of TELRIC. In all events, the 50% allocator is not supported by substantial evidence, and is arbitrary and capricious.

36. There is no evidentiary support for the Commission's conclusion that a carrier could serve the demands of all customers in Qwest's Minnesota service territory with only 50% of the trucks, tools, computers, etc., required today to serve that demand. Moreover, the Commission's exclusion of 75% of the general computer expenses incurred by Qwest to serve today's demand conflicts with the portion of its order, discussed below, adopting some of the lowest non-recurring changes in the country based on the assumption that virtually all of the relevant activities could be performed with computers.

D. Other Errors In Establishing Recurring Loop Rates

37. "Loops" are the wires or buried cable that connect homes and offices to the telephone company's "central office," where the telephone switch is located. The most basic loop is known as a "two-wire" loop, so named because at least a portion of the loop consists of a single pair of copper wires.

38. Loops are typically divided into "feeder" facilities, which extend from the central office to cabinet-sized terminals serving given neighborhoods, and "distribution" facilities, which extend through neighborhoods like branches from a tree from those terminals to individual homes and offices.

39. In Docket 1375, the Commission derived loop rates by using the HAI cost model that was developed on behalf of and paid for by its CLEC sponsors, AT&T and WorldCom. The HAI Model uses various assumptions or inputs to calculate the recurring loop rate. Adjustments to the inputs of the HAI can have a dramatic impact on the resulting loop rate.

40. Important inputs in determining loop costs include the percentages of cable that are buried, placed in underground conduit, and placed on telephone poles. These inputs are referred to as "plant mix." Aerial plant is less expensive to install but more expensive to maintain than other types of plant. In addition, municipalities and homeowner groups in Minnesota (and, indeed, across the country) are increasingly requiring companies to place facilities below ground for aesthetic reasons. As a result, standard engineering practice calls for the use of buried or underground instead of aerial plant whenever possible.

41. In Docket 1375, the Commission concluded that approximately 7% of the plant in the reconstructed network would be aerial, which is consistent with the amount of aerial plant in Minnesota today. At the same time, however, the Commission significantly and erroneously *decreased* the amount of underground plant from its previous findings in the 1998 cost docket (about 14% underground plant) to 5.4%.

42. The Commission's ruling on the amount of underground plant has no evidentiary support. The Commission based this reduction on an alleged confidential survey of Minnesota carriers conducted by the Minnesota Department of Commerce ("the Department"), an interested party to Docket 1375, for the purpose of preparing comments in a prior, unrelated proceeding. However, the Department only belatedly disclosed its reliance

on and never produced its study in Docket 1375 and, accordingly, neither the study nor the information underlying it was entered into the record.

43. The Commission's plant mix determinations result in an unbundled loop rate that denies Qwest the cost recovery to which it is entitled under the Act and TELRIC. The Commission's determinations are also arbitrary and capricious and unsupported by substantial evidence.

E. Other Errors In Establishing Switching Rates.

44. The Commission also relied upon the HAI Model to establish the costs of unbundled switching in the replacement network. As with the erroneous loop inputs discussed above, the Commission adopted unsupported and unlawful inputs to determine switching rates.

1. Fill Factor

45. One input used to determine rates for certain UNE rates is the "fill factor." For purposes of establishing switching rates, a fill factor refers to the percentage of the total capacity of a switch that is actually in use. Accepted engineering rules require allowing spare capacity in a switch for several purposes, including growth. High fill factors may reduce the amount of necessary equipment and thus costs, but they also jeopardize the quality or reliability of the service provided by the network. An AT&T witness testified that for this reason, AT&T operates its switches at fill rates of approximately 50%.

46. The Commission's decision to adopt a fill factor of 94% was based almost entirely on the FCC's use of that figure in proceedings to allocate among the fifty states a fixed amount of federal universal service funding. The FCC has consistently and expressly

admonished, however, that its decisions in its universal service proceeding in general, and its decision in that proceeding on the switching fill factor in particular, should not be used for the entirely different purpose of setting UNE rates. Nevertheless, the Commission relied upon the FCC's proceeding in adopting the 94% fill factor.

47. In addition, the Commission's decision is contrary to the overwhelming evidence that a 94% fill rate is not consistent with realistic or sound engineering practices. Indeed, even AT&T and WorldCom agreed that an efficient carrier would maintain spare capacity for, at a minimum, administrative purposes. The Commission, however, assumed that the operator of the replacement network would reserve virtually no spare capacity for administrative purposes or growth. With so little spare capacity, the slightest increase in demand would exhaust a switch and lead to busy signals and call blocking.

2. Integrated Digital Loop Carrier Adjustment

48. The Commission also adopted an "offset" to switching costs, purportedly to account for the "efficiencies" realized through the use with switches of other equipment known as "integrated digital loop carrier ("IDLC") systems." The FCC specifically rejected this offset when it was proposed by AT&T and WorldCom in its universal service proceeding. In stark contrast to its decision to base the switching fill factor on the FCC's ruling in its universal service proceeding, however, the Commission adopted the same proposed IDLC offset to switching costs that the FCC had rejected. Further, the Commission based its decision to adopt the proposed offset based on speculation by CLEC witnesses about "assumptions" used in the FCC's model that the FCC itself disavowed in rejecting the offset.

49. The Commission's fill factor assumption and digital loop carrier offset result in a switching rate that denies Qwest the cost recovery to which it is entitled under the Act and TELRIC. The Commission's determinations are also arbitrary and capricious and unsupported by the evidence.

F. Other Errors in Establishing DS-3 Transport Rates

50. High capacity circuits -- such as DS-1s, DS-3s, OC-3s, and OC-12s -- include (1) interoffice transport facilities that link different wire centers (switch locations) within a local telecommunications network; (2) entrance facilities that link the ILEC's wire centers with CLEC wire centers; and (3) high capacity loops that link end-users with high traffic volumes to an ILEC wire center. DS-1, DS-3 and other transport facilities differ largely with respect to the volumes of calls they can handle. DS-3 circuits, for example, can handle greater call volumes than DS-1 circuits.

51. The Commission again relied upon the HAI Model to establish rates for transport, including DS-1 transport and DS-3 transport. To derive the DS-3 transport rate, the Commission adopted a proposal by AT&T and WorldCom to reduce by more than 90% the costs developed by the HAI model for DS-1 transport. AT&T and WorldCom contended that this reduction was necessary to remove costs associated with certain equipment used in the provision of DS1 transport, but not in the provision of DS-3 transport. Their witnesses, however, were unable to provide any explanation or support for the amount of the reduction they proposed. The ALJs and the Commission nevertheless adopted the proposed reduction based on their observation that it would result in a 3:1 ratio of DS-3 costs to DS-1 costs, and their belief that Qwest's own proposals reflected a similar ratio. However, the DS-3 and DS-

1 costs proposed by Qwest produced a ratio substantially greater than 3:1. Thus, even if the DS-3:DS-1 cost ratio were relevant, it does not support the Commission's decision.

52. As a result of this reduction, the DS3 rates adopted by the Commission are among the very lowest in Qwest's fourteen-state region, and deny to Qwest the cost recovery to which it is entitled under the Act and TELRIC. The Commission's determination is also arbitrary and capricious and unsupported by the evidence.

G. Other Errors in Establishing High Capacity Loop Rate

53. "High capacity" loops are used to connect the premises of large customers, usually businesses, to the local telephone company's network. To establish rates for high capacity loops, the Commission adopted the HAI "Adjunct" Model developed on behalf of and paid for by AT&T and World Com. The Adjunct Model is based on costs associated with inputs used to build and maintain high capacity loops. These costs include prices offered by vendors for different goods and materials.

54. The AT&T and WorldCom witnesses who were called to testify on the Adjunct Model refused or were unable to produce, disclose or recall vendor prices or other data that would support many of the important costs it assumed. For example, the Adjunct Model includes no vendor price lists or invoices, no statements of the vendor discounts applied to the equipment, no descriptions of the type of equipment, no descriptions of the capabilities of the equipment, no listings of the utilization rates assumed for each piece of equipment, and not even a statement of the year assumed for the investments. The key assumptions in a cost study must be supported by documents and, where appropriate, expert testimony. The results generated by the Adjunct Model cannot be verified as accurate because there is no information in the Model or the record to support it. What is clear, however, is that the

model produces rates that are substantially below any reasonable TELRIC-based range. The recurring DS-1 loop rate produced by the model and adopted by the Commission is approximately $31, which is by far the lowest such rate in Qwest's region.

55. The Commission's reliance on the HAI Adjunct Model results in high-capacity loop rates that deny Qwest the cost recovery to which it is entitled under the Act and TELRIC. The Commission's reliance on that model are also arbitrary and capricious and unsupported by the evidence.

H. Other Errors in Establishing Non-Recurring Charges ("NRCs")

56. As noted above, Qwest requested that the Commission review and revise in Docket 1375 the NRCs that it had established in the 1998 cost docket. However, the Commission rejected that request and considered only orders and activities for which it had not previously approved an NRC.

57. NRCs are attributable to the one-time, labor-intensive activities necessary to respond to CLEC orders to connect, change, and disconnect network elements. A typical example is the charge for installation of the network elements needed for a CLEC's provision of a new service to its end users. Two of the primary functions associated with installing such elements are "order processing" and "provisioning." Processing an order typically involves verifying the accuracy of information in the order and transmitting that information to the various departments that will be responsible for performing the work needed to activate the new service. Provisioning an order involves the performance of that actual work. Provisioning an unbundled loop, for example, often requires rearranging wires in the central office or out in the field so that unbundled Qwest facilities can be connected to the CLEC network. More complex network elements typically require both customized network design

and more time-consuming wiring and testing work. In general, NRCs are typically estimated by identifying (1) the tasks that must be performed to fill a CLEC order, (2) the probability of having to perform each task, (3) the average amount of time necessary to perform each task, (4) the direct labor costs of the personnel performing the task, and (5) the appropriate share of joint and common costs (such as overhead) attributable to the non-recurring activities.

58. For unbundled loops that are to be connected to CLEC networks, Qwest can process (though not provision) many CLEC orders without human intervention, provided that, using an electronic interface, the CLEC accurately submits all of the required order information to Qwest's automated ordering systems. But not all CLECs live up to that standard. For example, Qwest demonstrated that despite the availability to them of electronic interfaces, CLECs place a significant number of orders via fax, requiring a Qwest representative to type the order information into Qwest's automated systems for further processing. Nevertheless, based on its rulings in the 1998 cost docket, the Commission ruled that *all* Qwest NRCs should assume a computerized "flow-through" rate of 95% .[2]

59. Furthermore, the Commission established unreasonably low rates associated with testing and coordinated installation of unbundled loops. In its 1998 cost docket, the Commission had established NRCs for loop installation that did not include testing and coordination ("basic installation"). The costs (and hence the rates) for the more advanced forms of loop installation considered in Docket 1375 include the costs of the activities undertaken in connection with basic installation, plus the costs of testing, coordination and other activities. In addition to denying Qwest's request that it review and revise the NRCs for

[2] In the same order that it determined that all order processing should be performed through computers, the Commission slashed by 50% or more the computer costs incurred by Qwest. *See* paras. 35-37, *infra*.

basic installation, the Commission refused to consider evidence addressed to any of the cost inputs relevant to both basic and advanced installations, but simply adopted its 1998 findings on the former for the purpose of determining NRCs for the latter. As a result, the Commission's NRCs do not permit recovery of the costs incurred today to processing and provisioning CLEC orders..

60. With regard to the testing and coordination activities for which there were no prior Commission findings, the Commission acknowledged that Qwest incurs additional costs in testing and coordinating installations, yet allowed only an additional $14 of cost for these activities. The Commission relied upon an AT&T "rework" of the Qwest NRC cost study that that eliminates manual activities that are essential to processing and provisioning orders, and lacks any evidentiary basis.

61. The NRCs adopted by the Commission for installations that include coordination and testing are dramatically lower than the rates adopted by several other state commissions in Qwest's region. For example, the Colorado Public Utilities Commission adopted rates of $142.10 and $171.87, in contrast to the rates of $14.42 and $16.64adopted by the Minnesota Commission.. The Arizona Corporation Commission adopted a rate of $141.67 for coordinated installation with testing and $117.30 for basic installation with testing. Both of these state commissions ruled that manual activities were necessary for these types of installations, and cannot be eliminated by any type of computerized flow-through. State commissions in New York, Pennsylvania, Louisiana, Georgia and New Jersey have likewise adopted rates for basic installation with testing and coordinated installation with cooperative testing above $100.

62. The NRCs adopted by the Commission in Docket 1375 deny Qwest the cost recovery to which it is entitled under the Act and TELRIC. The Commission's determinations are also arbitrary and capricious and unsupported by substantial evidence.

COUNT I

63. Qwest realleges and incorporates by reference the allegations contained in paragraphs 1-62 above.

64. The Commission has an obligation under Section 252 to interpret and enforce interconnection agreements it has approved in accordance with applicable federal law, including Sections 251 and 252 of the Act, as well as any applicable FCC rulings.

65. The Act establishes a comprehensive and exclusive set of procedures for interconnection agreements with an ILEC and enforcement of the obligations imposed on ILECs under Sections 251 and 252 of the Act. Moreover, the Act and FCC Orders including but not limited to 47 C.F.R. §§ 51.501-51.513 detail the exclusive process and procedure for creating and applying UNE rates on a prospective or forward looking basis.

66. Qwest's existing interconnection agreements with the CLECs were approved by Commission pursuant to the procedures mandated by federal law. The Commissions current attempt to circumvent the provisions of interconnections agreements applicable to modifications of Commission-approved interconnection agreements violates federal law.

67. The Commission Orders improperly require that new UNE rates be applied without regard to the rates, terms and conditions set forth in the controlling interconnection agreements and the express federal provisions establishing the process for forming and enforcing interconnection agreements. The Commission Orders effectively amend the

existing interconnection agreements between Qwest and the CLECs, without regard to the language of those agreements. Thus, the Commission Orders contravene the 47 U.S.C. §§ 251 and 252 and the FCC's. The Commission's ruling is also arbitrary and capricious and unsupported by substantial evidence.

68. Qwest is entitled to a judgment under 28 U.S.C. § 2201(a) declaring that the MPUC Orders are invalid and to an injunction prohibiting the enforcement of the MPUC Orders as part of the Court's final judgment.

COUNT II

69. Qwest realleges and incorporates by reference the allegations contained in paragraphs 1-68 above.

70. The Commission's refusal to review the UNE rates for which review was sought by Qwest violates 47 U.S.C. §§ 251 and 252 and the FCC's rules, and is arbitrary and capricious.

71. Qwest is entitled to a judgment under 28 U.S.C. § 2201(a) declaring that the MPUC Orders are invalid and to an injunction prohibiting the enforcement of the MPUC Orders as part of the Court's final judgment.

COUNT III

72. Qwest realleges and incorporates by reference the allegations contained in paragraphs 1-72 above.

73. The Commission's determinations in Docket 1375 of the costs of general support assets, and thus the rates it adopted for unbundled loops, unbundled switching,

shared transport and other UNEs, violate 47 U.S.C. §§ 251 and 252 and the FCC's rules, are arbitrary and capricious, and unsupported by substantial evidence.

74. Qwest is entitled to a judgment under 28 U.S.C. § 2201(a) declaring that the MPUC Orders are invalid and to an injunction prohibiting the enforcement of the MPUC Orders as part of the Court's final judgment.

COUNT IV

75. Qwest realleges and incorporates by reference the allegations contained in paragraphs 1-74 above.

76. The Commission's determinations in Docket 1375 regarding plant mix in, and thus the rates adopted by the Commission for unbundled loops, violate 47 U.S.C. §§ 251 and 252 and the FCC's rules, are arbitrary and capricious, and unsupported by substantial evidence.

77. Qwest is entitled to a judgment under 28 U.S.C. § 2201(a) declaring that the MPUC Orders are invalid and to an injunction prohibiting the enforcement of the MPUC Orders as part of the Court's final judgment.

COUNT V

78. Qwest realleges and incorporates by reference the allegations contained in paragraphs 1-77 above.

79. The Commission's determinations in Docket 1375 regarding the switching fill factor and the IDLC offset to switching costs, and thus the rates adopted by the Commission

39

for unbundled switching, violate 47 U.S.C. §§ 251 and 252 and the FCC's rules, are arbitrary and capricious, and unsupported by substantial evidence.

80. Qwest is entitled to a judgment under 28 U.S.C. § 2201(a) declaring that the MPUC Orders are invalid and to an injunction prohibiting the enforcement of the MPUC Orders as part of the Court's final judgment.

COUNT VI

81. Qwest realleges and incorporates by reference the allegations contained in paragraphs 1-81 above.

82. The Commission's determinations in Docket 1375 regarding the costs of DS3 transport, and thus the rates adopted by the Commission for DS3 transport, violate 47 U.S.C. §§ 251 and 252 and the FCC's rules, are arbitrary and capricious, and unsupported by substantial evidence.

83. Qwest is entitled to a judgment under 28 U.S.C. § 2201(a) declaring that the MPUC Orders are invalid and to an injunction prohibiting the enforcement of the MPUC Orders as part of the Court's final judgment.

COUNT VII

84. Qwest realleges and incorporates by reference the allegations contained in paragraphs 1-83 above.

85. The Commission's determinations in Docket 1375 regarding the costs of high capacity loops, and thus the rates adopted by the Commission for high capacity loops, violate

47 U.S.C. §§ 251 and 252 and the FCC's rules, are arbitrary and capricious, and unsupported by substantial evidence.

86. Qwest is entitled to a judgment under 28 U.S.C. § 2201(a) declaring that the MPUC Orders are invalid and to an injunction prohibiting the enforcement of the MPUC Orders as part of the Court's final judgment.

COUNT VIII

87 Qwest realleges and incorporates by reference the allegations contained in paragraphs 1-86 above.

88. The Commission's determinations in Docket 1375 regarding the costs of activities for which it established non-recurring charges, and thus the nonrecurring charges adopted by the Commission, violate 47 U.S.C. §§ 251 and 252 and the FCC's rules, are arbitrary and capricious, and unsupported by substantial evidence.

89. Qwest is entitled to a judgment under 28 U.S.C. § 2201(a) declaring that the MPUC Orders are invalid and to an injunction prohibiting the enforcement of the MPUC Orders as part of the Court's final judgment.

PRAYER FOR RELIEF

WHEREFORE, pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. §§ 1331, 2201-02, Qwest respectfully requests that this Court grant the following relief:

1. Judgment declaring that the actions and determinations of the Commission described in the foregoing counts violate the Act, the FCC's implementing regulations, due process, and Minnesota law.

2. An injunction (a) prohibiting all Defendants from taking any action to enforce the unlawful provisions of the Commission determinations challenged in this Complaint and (b) compelling further Commission proceedings to bring the network element rates challenged above into compliance with federal law.

3. Such other and further relief as the Court deems just and reasonable.

Dated this 23rd Day of April

DORSEY & WHITNEY LLP

By Theresa M. Bevilacqua
Robert E. Cattanach #0153734
Theresa M. Bevilacqua #031500X
Suite 1500, 50 South Sixth Street
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600

Roy Hoffinger
John M. Devaney
PERKINS COIE LLP
607 Fourteenth Street, N.W., Suite 800
Washington, D.C. 20005-2011
(202) 628-6600
(202) 434-1690 (facsimile)

Attorneys for Qwest Corporation

APPENDIX C

AG

P421/C-03-616

eschelon telecom, inc.

April 18, 2003

RECEIVED
APR 21 2003
MN PUBLIC UTILITIES COMMISSION

By U.S. mail

Dr. Burl W. Haar
Executive Secretary
MN Public Utilities Commission
121 East Seventh Place, Suite 350
St. Paul, MN 55101-2147

Re: Request for Investigation and Process for Addressing Time Critical Issues

Dear Dr. Haar:

Eschelon Telecom, Inc. ("Eschelon"), asks the Minnesota Public Utilities Commission ("the Commission") to investigate the nature and extent of improper contacts between Qwest Wholesale and Qwest Retail, as well as other issues raised by a recent example of a customer-affecting conversion gone wrong. Eschelon also asks the Commission to address procedural processes and mechanisms for obtaining regulatory assistance when these time critical issues occur. Fifteen additional copies of this letter are enclosed for your convenience.

I. Improper Contacts Between Qwest Wholesale and Qwest Retail and Related Issues.

In the example prompting this request,[1] a Minnesota end-user customer signed a Letter of Authorization ("LOA") to switch carriers from Qwest to Eschelon. Eschelon initiated the process to convert the customer, including submitting a Local Service Request ("LSR") with an Eschelon desired due date of April 9, 2003. Qwest's processing of this request involved several errors and examples of improper conduct. Qwest's conduct raises questions that should be investigated, particularly with respect to the frequency with which the problems occur and the steps needed to correct them.

1. Qwest-caused outage when converting customer to another carrier.

First, almost *two weeks* before the LSR due date, on March 27, 2003, many of the customer's telephone numbers[2] went out of service. Eschelon later learned that a Qwest

[1] With respect to this example, enclosed are the following Attachments: (1) Eschelon's April 3, 2002 urgent request for assistance; (2) Qwest reject notice; (3) Eschelon's April 17, 2003 email summarizing outstanding issues and attaching Qwest's root cause analysis emails; and (4) Qwest Retail email to Eschelon's end user customer.
[2] The telephone numbers in the affected service orders consisted of two blocks of Direct Inward Dial ("DID") numbers.

wholesale typist made an error in the Qwest service order and brought the lines out of service two weeks early. Qwest has now agreed that it made this error. Naturally, the end user customer was upset about the unexpected outage.

2. Qwest misinformation about cause of outage.

Unfortunately, in these situations, it appears to the end user customer that the Competitive Local Exchange Carrier ("CLEC") is to blame, because the outage occurs after a request to switch carriers has been made. It is difficult enough for CLECs to deal with this general misimpression and explain such problems. In this case, Qwest worsened the situation by actually telling the customer that the outage was Eschelon's fault. Qwest told the customer that the service was disconnected at the request of Eschelon without disclosing Qwest's error in processing that request. Qwest had not used the due date that Eschelon requested on the LSR. Instead of admitting this, Qwest created a "he said, she said" situation that frustrated the customer.

Eschelon has also been told that a Qwest Retail representative/agent provided a letter to the customer indicating that the errors were caused by Eschelon. The customer does not want to get caught in the middle of this dispute and may even have been told by Qwest Retail not to share the information with Eschelon. Eschelon has asked Qwest for a copy of any such communication to the customer, but Qwest has not provided a copy.

3. Qwest rejection of Eschelon's customer-requested cancellation request and processing of Qwest's own cancellation order.

The end user customer was so upset about the outage that the customer asked Eschelon to cancel the LSR and stop the carrier switch. Eschelon submitted a request to cancel the earlier LSR. Qwest rejected Eschelon's supplemental request to cancel its earlier LSR. The Qwest rejection notice stated that Qwest could not complete Eschelon's cancellation request because Qwest had completed some of its service orders.[3] Despite this Qwest systems limitation, Qwest was telling Eschelon that it needed to cancel the LSR (and associated service orders).[4] Eschelon escalated the issue to obtain cancellation of the remainder of the service orders associated with the LSR. Qwest then told Eschelon that Eschelon's remaining orders were already cancelled. Only Eschelon can cancel its own LSR/order. Qwest does not have the authority to cancel a CLEC's LSR/order. If Qwest did so, the CLEC could not control its own order process and the choice and timing of cancellation decisions. The problem is particularly serious if Qwest Retail cancelled the Eschelon order, because Qwest Retail should not be involved in the process at this point at all.

---

[3] *See* Att. 2 (reject notice stating: "One or more Service Orders completed. Unable to process cancellation supplemental").
[4] Eschelon submits one LSR for which Qwest may create multiple internal service orders.

4. **Qwest Retail's failure to refer CLEC customer to CLEC.**

It appears that Qwest Retail did cancel Eschelon's remaining orders. The customer told Eschelon that Qwest Retail informed the customer that it cancelled Eschelon's remaining orders but would re-issue the orders if Eschelon did not cancel its LSR per the customer's request.[5] Qwest Retail should not have been handling this issue for a CLEC customer. Qwest has now agreed that Qwest Retail should have referred this customer to Eschelon.

5. **Qwest Wholesale communication to Qwest Retail about CLEC customer.**

Unfortunately, this was not the only Qwest Retail communication with the CLEC customer. The other Qwest Retail communication to the customer resulted from a contact by Qwest Wholesale to Qwest Retail. Qwest Retail then sent an email directly to Eschelon's customer. In the email, the Qwest Retail representative specifically said:

"***I was contacted by our wholesale group***. . . ."

See Att. 4 (emphasis added). It cannot be disputed that the Qwest Wholesale to Qwest Retail communication occurred. All communications about this outage, caused during processing of a CLEC LSR to convert the customer to the CLEC, should have been occurring between Eschelon and Qwest Wholesale at this point. Nonetheless, Qwest Retail proceeded to report on the alleged status of the Eschelon orders to Eschelon's customer. Under no circumstances should Qwest Retail be initiating an email to convey wholesale information about the alleged status of a CLEC LSR directly to the CLEC's end user customer. Qwest Wholesale should have contacted Eschelon, so that Eschelon could have communicated any relevant information to its customer.

When CLECs hear of such Qwest Wholesale-Qwest Retail contacts, or believe based on a course of events that they have occurred, CLECs face a huge uphill battle in attempting to prove the conduct. Rarely are the contacts in writing or, if they are written, the customers do not want to be caught in the middle by providing copies to the CLEC. Being able to prove the contact through an email provided to the CLEC is not likely to happen often. An investigation is needed into the circumstances under which such contacts occur and how to prevent them.

6. **Qwest misinformation about Eschelon efforts to comply with customer's cancellation request.**

In the improper Qwest Retail email to Eschelon's customer, Qwest Retail said the Qwest Wholesale group "advised that due to the fact that they have an ASR that has not been canceled by Eschelon that they have to reissue those orders due on 4-09. Eschelon

[5] *See also* Email from Qwest Retail to Eschelon's customer, discussed below.

HAS to cancel the ASR with our wholesale group or these orders will process." *See* Att. 4.[6] This Qwest statement suggests that Eschelon was not acting in good faith to abide by the customer's request and cancel the LSR. This created an impression with the customer that Eschelon was acting against the customer's expressed wishes and further angered the customer. Additionally, Qwest Retail's statement suggests that, if Eschelon does not correct its alleged failure and cancel the LSR, the customer's service will go down AGAIN because Qwest wholesale will have to "reissue" the conversion orders. Such a possibility would naturally deter a customer from switching carriers. In fact, however, as discussed above, Qwest prevented processing of Eschelon's cancellation request first through Qwest system limitations and then by Qwest's own actions in canceling the orders. Qwest's failure to disclose Qwest's role in preventing the Eschelon cancellation from processing mislead the customer. It appeared that Eschelon was not following process and deliberately acting against the customer's wishes, when Eschelon had followed the proper procedure to cancel the LSR.

To make matters worse, Qwest also suggested to the customer that restoring service took longer than necessary because of Eschelon's alleged failure to cancel the LSR. If restoring service took longer than necessary, however, the delay was due to Qwest's initial error in typing the service order incorrectly so that the order was processed two weeks early. When service orders complete, information about the office equipment (located in the switch; known as Line Equipment Number, "LEN") may be reassigned in the Qwest system. When this happens, the LEN is lost for this customer, and a new LEN must be obtained. If a CLEC LSR is canceled before the Qwest service order completes, the LEN is preserved and still available for this customer. If obtaining a new LEN resulted in a delay in restoring service, Qwest caused that delay by erroneously completing service orders long before the requested due date. Qwest's systems and its own cancellation of Eschelon's orders then prevented Eschelon from canceling the LSR. Attempting to explain the interaction of CLEC LSRs and Qwest service orders, including the manner in which LSRs are processed and what happens when service orders complete, to an end user customer is difficult and obviously leads to confusion. The customer simply remembers that Qwest said Eschelon's alleged failure to cancel the LSR caused a delay in restoration of service. This is not the case.

7. <u>Qwest policy of not correcting its misinformation for customer</u>.

As often happens in the "he said, she said" situation, the end user customer demanded that Eschelon provide a written statement from Qwest stating clearly that Qwest made the error causing the outage and that Eschelon had complied with the customer's wishes. Because Qwest had created doubt about Eschelon's explanation of the problem, the customer would not rely on Eschelon's statement alone and wanted confirmation from Qwest itself. Eschelon requested such a statement from Qwest. Qwest's senior service manager for Eschelon's account told Eschelon, as Qwest has done

[6] Qwest Retail erroneously refers to the "LSR" as an "ASR."

on other occasions, that Qwest's policy is that Qwest will not provide a written statement to be provided to the customer, even when the purpose of the statement is to correct Qwest misinformation.[7] Eschelon reiterated that it was not asking Qwest to contact the end user customer but wanted a written statement that Eschelon could use to meet the customer's demand. Qwest's senior service manager then said that, in this instance, she would provide a root cause analysis of the issue rather than a statement about cause of the errors.

Qwest's initial root cause analysis was written in a manner so convoluted that no ordinary customer would understand that the end result was an admission of Qwest error. It also did not address all of the issues raised by Eschelon. Since then, Qwest finally provided a more clear statement that the "Qwest SDC issued two orders assigning a due date of March 27, 2003 instead of the Eschelon requested due date of April 9. 2003." *See* Att. 3 (attaching Qwest email). While it does not refer to an error and does not address other issues, at least Eschelon may finally show the customer a Qwest statement that admits it assigned the wrong date (assuming the customer understands and accepts that "issued two orders assigning a due date" means creating two orders with incorrect dates). The length of time, and the amount of resources, that it has taken to obtain this partial response, however, is unacceptable. Eschelon's provisioning and carrier relations personnel and attorney have spent numerous hours on this issue and have had to make repeated requests to multiple representatives at Qwest about it. Eschelon identified this issue as "urgent" to Qwest on April 3, 2003. Qwest did not provide this response until April 16, 2003 – nearly two weeks later. Two weeks to get this information, particularly when it is needed to correct Qwest misinformation, is too long in a conversion situation. The end user customer's carrier selection is in the balance, and time is of the essence.

8. Qwest's use of Wholesale error as Retail Win-Back opportunity.

In this case, Eschelon still does not know if the customer will switch to Eschelon. Although the customer previously chose Eschelon and authorized the switch, Qwest's Wholesale and Retail divisions have acted together to change that result. Now, Qwest is using this situation as a win-back opportunity.

The Commission should investigate these issues and the frequency with which they occur. In Minnesota's 271 investigation, the Administrative Law Judge ("ALJ") has already found that AT&T presented credible evidence supporting a finding that individual employees have made *ad hoc* efforts intended to convince customers to remain

[7] Qwest also attempted to divert the issue by claiming that Eschelon did not have an LOA for this conversion. Eschelon had to provide a copy of the LOA to Qwest to get the discussion back on track. Eschelon informed Qwest that, even assuming there was no LOA (which was NOT the case), other remedies are available to address slamming and related issues. LOA-type issues cannot be used as a license to allow Qwest Wholesale and Retail to engage in improper contacts, Qwest to cancel CLEC orders, Qwest to convey misinformation to the CLEC customer, etc.

with Qwest.[8] Eschelon's example provides more recent corroboration that such conduct occurs, even after Qwest has allegedly re-trained its personnel on the rules. This suggests that the behavior is not *ad hoc*. The Commission should determine whether Qwest has a policy (directly or indirectly) of allowing such conduct or otherwise condoning (expressly or implicitly) such conduct. When considering the nature and extent of CLEC examples of such conduct in making this determination, the Commission should consider the evidentiary obstacles faced by CLECs. It is difficult for CLECs to prove and quantify such issues because the communications are usually oral and, by their nature, occur between Qwest and the customer and thus are not visible to CLECs. Regulators have more authority and ability to gain visibility into what is actually occurring within Qwest than CLECs have on their own.

The ALJ indicated that the Federal Communications Commission ("FCC") has found that "the appropriate fora for such allegations are proceedings before state commissions."[9] The Minnesota commission should investigate the issues raised here.

II. Regulatory Process for Assistance With Time Critical Issues

Eschelon also asks the Commission to address procedural processes and mechanisms for obtaining regulatory assistance when these time critical issues occur. When examples such as the one described here occur, immediate assistance is needed. A formal complaint has many drawbacks in such a situation. Time and resources are among the largest drawbacks. Also, in this example, Eschelon needed some discrete items immediately to attempt to satisfy the customer, such as a clear statement from Qwest that it made the error that caused the outage and that the information Qwest provided to the customer was erroneous. While the legal ramifications and remedies of the incident may be worked out later in formal complaints, a complaint is not always the best method of addressing such immediate needs.

Eschelon did turn to the Minnesota Department of Commerce ("DOC") for assistance with respect to this situation. Eschelon commends the DOC for its efforts to work with both parties to assist in obtaining needed information. Earlier, when attempting to obtain the information directly from Qwest, Eschelon told Qwest that it would be contacting the DOC and PUC. Eschelon believes that invoking the state agencies assisted in getting the partial answer that Qwest finally provided. More is needed with respect to this particular issue (*see* #2-#7 in Att. 3), and there are the larger implications of this example that should be investigated.

---

[8] Findings of Fact, Conclusions of Law and Recommendations, Office of Administrative Hearings, *In re. Commission Investigation into Qwest's Compliance with Section 271(c)(2)(B) of the Telecommunications Act of 1996; Checklist Items 1, 2, 4, 5, 6, 11, 13, and 14*, 7-2500-14486-2, MN PUC Docket No. P-421/CI-01-1371 (Jan. 24, 2003) ("Minnesota ALJ Order") at p. 103, ¶ 345.
[9] *Id.* at p. 103, ¶ 346.

730 Second Avenue South • Suite 1200 • Minneapolis, MN 55402 • Voice (612) 376-4400 • Facsimile (612) 376-4411

voice data internet

Eschelon would welcome the opportunity to participate in discussions about mechanisms that could be put in place or formalized for regulators to help address such issues. An informal process, based on letters and even oral complaints, already exists for end user customers. Eschelon inquired about that process in this situation but learned that it does not necessarily apply to carrier-to-carrier issues. Perhaps some kind of parallel informal carrier-to-carrier process, with a known point of contact, could be established. Another possibility would be Commissioner or staff intervention. In one situation in which I was involved on behalf of a former client some time ago, Commissioner Scott asked the CLEC and Qwest to meet with him to discuss a conversion that had gone bad. His intervention led to an exchange of information at a level and in a timeframe that CLECs on their own often are not able to obtain, and it hastened bringing the matter to a conclusion. These processes would not replace formal complaints (unless otherwise agreed by the parties) but would provide some means to address the time critical issues earlier. Often, doing so is a function of getting the attention of the right people at the right level to address the issue and provide needed information. Regulators are in a better position to obtain this result than CLECs.

Eschelon encourages the Commission to initiate such discussions. We appreciate your attention to this matter.

Sincerely,

Karen L. Clauson

Karen L. Clauson
Senior Director of Interconnection
Eschelon Telecom, Inc.
612.436.6026

cc: J. Jeffery Oxley, Eschelon
Jason Topp, Qwest
JoAnn Hanson, Qwest
Department of Commerce
Attached Service List

ATTACHMENT 1

-----Original Message-----
From: Johnson, Bonnie J.
Sent: Thursday, April 03, 2003 10:01 AM
To: jlnovak@qwest.com
Cc: Clauson, Karen L.; Larson, Laurie A.; Johnson, Bonnie J.
Subject: URGENT ISSUE
Importance: High

Hi Jean,
Eschelon has an urgent matter we need assistance with quickly. This following is the details of the conversion of the first location of a new multi-location National Account for Eschelon. Due to a Qwest error and misinformation provided by a Qwest retail rep to our customer, Eschelon now has the task of attempting to save this customer. The following is the detail you will need (Call Laurie Larson if more detail is needed) to provide root cause and address the attached E-mail that a Qwest Retail employee sent to our customer.

- Eschelon submitted Pon #MN272445DMMT1 (requesting LNP) on 3/27/03 and requested a DD of 4/9/03.
- Qwest created five service orders as a result of this LSR.
- Qwest processed order numbers C90860457, C90860458, C90860459 with the correct requested DD of 4/9/03.
- Qwest processed order numbers C90860455 and C90860456 with a DD of 3/27/03 (in error). Eschelon requested a DD of 4/9/03.
- Qwest worked and completed the above service orders on 3/27/03 (early) which brought customers DIDs (2 groups of 20 or 40 numbers) out of service (unexpectedly).
- Eschelon opened escalation ticket # 25067300 on 3/28/03 and spoke with Emily & Peter at Qwest (612-307-1836), to work the customer's out of service issue.
- Qwest escalations created two new service orders to work the two groups of 40 DID numbers back into Qwest switch - C90640977 & C90640978.
- As a result of Qwest's error in processing the LSR, the customer blamed Eschelon and asked to cancel the remaining orders.
- Eschelon attempted to cancel (sup to cancel) the LSR on 3/28/03, but Qwest rejected the sup to cancel stating that service orders associated with the LSR had already completed and the LSR could not be canceled (see attached fatal reject). Eschelon opened escalation Ticket # 25070162 to get the three remaining service orders canceled because the sup to cancel was rejected by Qwest. Qwest advised Eschelon that the orders were already cancelled. This presents another problem with this LSR, because Retail is not allowed to cancel a Wholesale order. Only Eschelon can cancel an order. Did Qwest Retail cancel these orders per Customer Contact? If so, that is out of process and inappropriate. If not, please explain how these orders could have been canceled before Eschelon cancelled them. The customer shared that they called Qwest Retail and asked Qwest Retail to cancel the orders. Qwest

Retail told the customer the remaining orders were canceled but they would be issued again if Eschelon did not cancel the LSR per the customer.

- Qwest Retail employee stated to the customer that Eschelon was causing the issues with their service because we would not cancel the LSR (Qwest Retail referenced a ASR in below E-mail in error). Qwest Retail should not have told the customer that Eschelon needed to cancel the LSR. The customer is extremely upset with Eschelon for not canceling the orders (which we could not do, due to Qwest's errors).
- Qwest Retail employee informed customer (see E-mail below that Qwest Retail sent directly to our customer) that Eschelon had not canceled the additional orders and the customer's service would go down. Qwest Retail employee admits receiving information from Qwest Wholesale.
- It appears that Qwest Retail blamed Eschelon for a known Qwest error to improperly winback the customer.

Action Required: **Please address**:

- Inaccurate DD typed on the service order.
- Who at Qwest (and whether Retail) canceled the three remaining service orders.
- Qwest Wholesale employee that provided a Retail employee information on a Wholesale request.
- **The most critical piece...Immediately provide to Eschelon a written retraction of the Qwest Retail employee's statement, indicating this was a Qwest error. Qwest to address situation sufficiently to satisfy Eschelon's customer that Qwest did not follow process and provided misinformation to the customer. To be clear, Eschelon will communicate directly with customer but needs written statement from Qwest because customer unwilling to rely on Eschelon to correct Qwest misinformation.**

Qwest needs to respond and take action quickly.

Thanks in advance and please call Laurie (436-1630 cell 612 386-5213) if you need further details on the LSRs.

Bonnie Johnson
Sr. Manager ILEC Relations
Eschelon Telecom, Inc.
Phone 612 436-6218
Fax 612 436-6318
Cell 612 743-6724

> >
> > ----- Original Message -----

➢ > From: [QWEST NAME REDACTED]@Qwest.com]
➢
➢ > To:
➢ > > Sent: Friday, March 28, 2003 3:01 PM
> > Subject: Re: DID Numbers
> >
> >
> > > Hi [CUSTOMER INFORMATION REDACTED],
> > >
> > > Just to let you know, I was contacted by our wholesale group
and
> > > they
> > > advised that due to the fact that they have an ASR that has
not been
> > > canceled by Eschelon that they have to reissue those orders
due on
> > > 4-09. Eschelon HAS to cancel the ASR with our wholesale
group or these
>
> > > orders will process.
> > >
> > > If you could get the information to [CUSTOMER NAME
REDACTED] I'd really appreciate it
> > > because I know it's a big issue if the lines go down.
> > >
> > > Thanks!
> > > [QWEST NAME REDACTED]
> > >

Bonnie Johnson
Sr. Manager ILEC Relations
Eschelon Telecom, Inc.
Phone 612 436-6218
Fax 612 436-6318
Cell 612 743-6724

[SEE ATTACHMENT 2 FOR ENCLOSURE]

ATTACHMENT 2

(5) OrderType: 865 PON+Ver:MN272445DMMT1-2 (FATAL REJECT)

Content-Length: 452

```
ISA|00|          |00|          |ZZ|QWESTO         |ZZ|ESCHELONO
|030328|0928|U|00402|442000230|0|P|_
GS|CA|FATAL10|ESCHELONO|20030328|0928|442000057|X|004020
ST|865|570001
BCA|44|RF|MN272445DMMT1||2|20030328
PAM|AH|1|EA
DTM|150|20030409
N1|78|A07
N1|BY||25|7099
POC|1|RZ|||||ZZ|FERR
N9|1Q|ORI|WO       999
MTX||One or more Service Orders completed. Unable to process cancellation
supplemental.
CTT|1
SE|11|570001
GE|1|442000057
IEA|1|442000230
```

ATTACHMENT 3

-----Original Message-----
From: Clauson, Karen L.
Sent: Thursday, April 17, 2003 4:37 PM
To: JoAnn Hanson; 'jtopp@qwest.com'
Cc: 'Greg Doyle'; Susan Peirce
Subject: carrier-to-carrier problem

Jason and JoAnn:

Eschelon has reviewed your email response and believes that there are issues outstanding, some of which are more time sensitive than others (due to the customer issue) but all of which are important to address.

Two weeks ago, on April 3rd (in the enclosed email), Eschelon identified this customer-affecting problem as "urgent" and identified several required actions. Eschelon identified the most critical piece as immediately providing a written retraction of the Qwest retail employee's statement, including indicating that Qwest made the errors. Eschelon specifically asked Qwest to address the situation "sufficiently to satisfy Eschelon's customer that Qwest did not follow process and provided misinformation to the customer." Qwest has provided a portion of the "most critical" information but not all of it. Qwest has finally provided a more clear statement that it made the typing error but Qwest has not provided a written explanation correcting all of the misinformation that Qwest provided to our customer. One problem is that the customer needed to know that a Qwest error brought the service down in the first place. That is the piece Qwest has attempted to address. The other piece of Qwest misinformation is Qwest Retail's suggestion that Eschelon did not attempt to cancel the remaining orders when in fact it did. (The inability to cancel was a Qwest issue.) The end user customer was so upset about the initial outage (the first unfair strike against Eschelon) that the customer wanted the other orders canceled so the conversion would not take place. The Qwest Retail email to the customer makes it sound as though Eschelon was improperly hanging on to the customer and not canceling the orders against the customer's wishes (an unfair second strike against Eschelon). Qwest has not provided any statement to Eschelon at all to correct the misinformation that Qwest provided to the customer on this issue. And, Qwest took so long to provide an answer to Eschelon on the first issue that the customer is now blaming Eschelon for the delay (unfair strike three). This is anti-competitive.

Time Critical Information/for Eschelon to provide to customer

1. Qwest written statement that it made typist errors that resulted in out of service condition -- still less clear than requested, but more clear than initial statement. To extent Qwest indicates it will respond, RESPONSE RECEIVED (although untimely).

2. Qwest written statement that Qwest Retail provided misinformation to Eschelon customer (see Qwest 3/28/ email below), so that Eschelon end-user customer believed that Eschelon had not requested cancellation of orders per customer's request when Eschelon had in fact tried to do so. Confirm Eschelon

tried to cancel orders but could not do so and that Qwest canceled orders when Qwest should not have done so. OUTSTANDING.

Additional Important Issues

3. Acknowledge and address improper wholesale/retail contact. Qwest suggests (in 4/9 email below) that Qwest Retail was involved only as a result of end user contact (claiming that Qwest retail "succumbed" to the end user's "extreme insistence"). Qwest is correct that the Qwest Retail rep acted improperly and should have sent any such call to CLEC. Qwest's corrective action relates only to that issue (and provides no documentation to support what was done in that case). Qwest ignores the main wholesale/retail issue about which Eschelon complained, however. On 4/3, Eschelon provided Qwest with a copy of the Qwest Retail email to Eschelon's customer (see below). In that email, the Qwest Retail rep clearly states that "**I was contacted by our wholesale group**." By Qwest's own written admission, Qwest Retail contacted Eschelon's customer directly as a result of a WHOLESALE (not a customer) contact. Qwest has not addressed this issue at all. Under what circumstances does Qwest wholesale contact Qwest retail? Qwest needs to provide an explanation, along with information about the frequency of such contacts and documented steps to prevent such contacts in the future. This issue, in particular, may need to come to the attention of the PUC. OUTSTANDING.

4. Identify who at Qwest (and whether Retail) canceled the remaining orders. Qwest rejected Eschelon's sup to cancel and told Eschelon that the orders were already canceled. (Bullet point 9 in Eschelon 4/3 email). Only Eschelon should have been able to cancel its orders. Who canceled the orders, per what process, and what corrective steps are being taken? OUTSTANDING.

5. Qwest claims (in 4/9 email below) that "The Workback process was followed correctly." Eschelon has been unable to find documentation of this process needed for verification. Please provide documentation (or URL for documentation) of the workback process. OUTSTANDING.

6. As indicated in my 4/15 email, the Qwest Retail Account Team allegedly instructed the customer not to share information with us, including a letter allegedly written by Qwest to the customer stating essentially that Eschelon caused the out of service condition. Qwest said that corporate compliance is checking on whether any Qwest Retail rep/agent sent a written document to the end user customer about this situation. Eschelon has asked Qwest to promptly provide a copy of the written document. OUTSTANDING.

7. Timeliness of Response. More immediate action is needed when a customer affecting situation occurs and corrective action is required. In its 4/3 email, Eschelon asked Qwest to move quickly and immediately. This wasn't done. Why not and what processes will be put in place to obtain better response time? Additionally, this discussion started out with Qwest indicated (as it has in other instances) that its policy is that it does not provide written statements/retractions of the type requested by Eschelon. Eventually, Qwest did provide such information. Qwest needs a policy that recognizes this type of

situation and provides a quick method for obtaining such retractions when Qwest misinformation to a customer needs to be corrected. OUTSTANDING.

NOTE: Customer-identifying information in this email and enclosures, if any, is confidential/proprietary/trade secret.

Karen L. Clauson
Senior Director of Interconnection
Eschelon Telecom, Inc.
730 2nd Ave. South, Suite 1200
Minneapolis, MN 55402
Phone: 612-436-6026
Fax: 612-436-6126

Eschelon April 3rd Urgent email to Qwest:

[SEE ATTACHMENT 1]

Qwest Retail email to Eschelon customer:

> > ----- Original Message -----
➢ > From: "[QWEST NAME REDACTED@qwest.com]
➢ > To: "[CUSTOMER NAME REDACTED]
➢ > > Sent: Friday, March 28, 2003 3:01 PM
> > Subject: Re: DID Numbers
> >
> >
> > > Hi [CUSTOMER NAME REDACTED],
> > >
> > > Just to let you know, I was contacted by our wholesale group and
> > > they
> > > advised that due to the fact that they have an ASR that has not been
> > > canceled by Eschelon that they have to reissue those orders due on
> > > 4-09. Eschelon HAS to cancel the ASR with our wholesale group or these
>
> > > orders will process.
> > >
> > > If you could get the information to [CUSTOMER NAME REDACTED] I'd really appreciate it
> > > because I know it's a big issue if the lines go down.
> > >
> > > Thanks!
> > > [QWEST NAME REDACTED]
> > >

Initial Qwest email explanation:

-----Original Message-----
From: **Novak, Jean [SMTP:jlnovak@qwest.com]**
Sent: Wednesday, April 09, 2003 12:38 PM
To: bjjohnson@eschelon.com
Cc: Novak, Jean
Subject: URGENT ISSUE
Importance: High

Bonnie,

I have involved the appropriate Qwest personnel to review and take appropriate action regarding this issue.

First regarding, the 2 orders with incorrect dues. The Center Coach supervising the Qwest SDC that issued the 2 orders, has reviewed these orders. This meeting between the Qwest SDC and the Center Coach took place on March 31, 2003. Qwest will continue to monitor this issue and take further action, as appropriate.

Second, to address the workback issue on March 28, 2003. Eschelon contacted the Qwest CSIE to open an Escalation Ticket 25067300 to "workback" the end user's service as a result of incorrect due dates on two orders. When the workback orders were issued to re-establish end user's service, Qwest found 1 TN that belonged to another CLEC. Eschelon was advised that 1 TN was not on the CSR and Eschelon would need a sup to address the TN. The Workback process was followed correctly.

At the same time that Eschelon and Qwest Wholesale were working to re-establish the end user, the end user was calling Qwest Retail. The Qwest Retail SDC did advise the customer that orders could not be cancelled by Qwest Retail and referred the end user to Eschelon. However, due to the extreme insistence by the end user ([NAME REDACTED]); the Qwest Retail SDC succumbed to the end user's request.

On April 4, 2003, the Qwest Retail SDC was covered on the correct process. The Qwest Retail SDC has been made aware that the correct action would have been to maintain advising the end user to contact the CLEC. Qwest will continue to monitor this issue and take further action, as appropriate.

Lastly, Qwest Wholesale process will be working jointly with Qwest Retail process to re-enforce.

Thanks, jean

Additional information provided by Qwest after contacting attorneys:

-----Original Message-----
From: Novak, Jean [SMTP:jlnovak@qwest.com]
Sent: Wednesday, April 16, 2003 5:56 PM
To: Clauson, Karen L.
Cc: Masztaler, Joan; Topp, Jason; Rosenthal, Blair A; Novak, Jean
Subject: URGENT ISSUE

Karen,

I am writing in response to your latest correspondence on this issue. We have reviewed my email and Qwest believes that I accurately set forth the circumstances surrounding this matter and our response. If it would help, allow me to clarify as follows. The Qwest SDC issued two orders assigning a due date of March 27, 2003 instead of the Eschelon requested due date of April 9, 2003.

We have no knowledge of any correspondence that Qwest retail may have sent the end user other than the email that Bonnie Johnson provided from [QWEST NAME REDACTED], Qwest to [CUSTOMER NAME REDACTED]. I will, however, forward this matter to corporate compliance for investigation. If you have further information that we should consider, please let me know.

thanks, jean

ATTACHMENT 4

> > ----- Original Message -----
➢ > From: "[QWEST NAME REDACTED@qwest.com]
➢ > To: "[CUSTOMER NAME REDACTED]
➢ > > Sent: Friday, March 28, 2003 3:01 PM
> > Subject: Re: DID Numbers
> >
> >
> > > Hi [CUSTOMER NAME REDACTED],
> > >
> > > Just to let you know, I was contacted by our wholesale group
and
> > > they
> > > advised that due to the fact that they have an ASR that has
not been
> > > canceled by Eschelon that they have to reissue those orders
due on
> > > 4-09. Eschelon HAS to cancel the ASR with our wholesale
group or these
>
> > > orders will process.
> > >
> > > If you could get the information to [CUSTOMER NAME
REDACTED] I'd really appreciate it
> > > because I know it's a big issue if the lines go down.
> > >
> > > Thanks!
> > > [QWEST NAME REDACTED]
> > >

Dr. Burl W. Haar
Executive Secretary
MN Public Utilities Commission
121 East Seventh Place, Suite 350
St. Paul, MN 55101-2147

Linda Chavez
Telephone Docketing Coordinator
Minnesota Department of Commerce
85 Seventh Place E., Suite 500
St. Paul, MN 55101-2198

Greg Doyle
MN PUC
350 Metro Square Building
121 Seventh Place East
St. Paul, MN 55101

Michael J. Bradley
Moss & Barnett
4800 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-4129

JoAnn Hanson
Qwest Corporation
200 S. Fifth St., Suite 390
Minneapolis, MN 55401

Dan Lipschultz
Moss & Barnett
4800 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-4129

Jason Topp
Qwest Corporation
200 South Fifth Street, Room 395
Minneapolis, MN 55402

Lesley James Lehr
MCI
638 Summit Avenue
St. Paul, MN 55105

David Conn
McLeodUSA Technology Park
6400 C Street SW
Cedar Rapids, IA 52406-3177

Gregory L. Wilmes, CEO
New Access Communications
801 Nicollet Mall
Suite 350
Minneapolis, MN 55402

Harry Pliskin
Covad Communications
7901 Lowry Boulevard
Denver, CO 80230

APPENDIX D

RECEIVED

APR 2 3 2003

MN PUBLIC UTILITIES COMMISSION

PUC WORKING COPY

P421/C-03-627

①

eschelon℠ telecom, inc.

April 23, 2003

Comm
Carol
AG
Mark
Marc

Dr. Burl Haar
Minnesota Public Utilities Commission
121 7th Place East
Suite 350
St. Paul, MN 55101-2198

Re: In the matter of the Complaint of Eschelon Telecom of Minnesota, Inc. against Qwest Corporation, Inc.

Dear Dr. Haar:

Enclosed are an original and 15 copies of the Complaint Against Qwest Corporation, and Request for Expedited Proceeding Pursuant to Minn. Stat. 237.462, in connection with the above-referenced matter. Also enclosed is an affidavit of service.

Please feel free to contact me with any questions.

Sincerely,

Kim K. Wagner

Kim K. Wagner
Senior Legal Secretary
Eschelon Telecom, Inc.
(612) 436-6225

Enclosures

cc: Attached Service List

STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	**Chair**
R. Marshall Johnson	**Commissioner**
Gregory Scott	**Commissioner**
Phyllis Reha	**Commissioner**
Ellen Gavin	**Commissioner**

In the matter of the Complaint of)
Eschelon Telecom of Minnesota, Inc.)
against Qwest Corporation, Inc.)
)
)
)
)

Docket No. P______________________

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Kim K. Wagner, being first duly sworn, deposes and says that on April 23, 2003, at the City of Minneapolis, State of Minnesota, she served the attached Eschelon Telecom, Inc.'s Complaint against Qwest Corporation, and Request for Expedited Proceeding Pursuant to Minn. Stat. 237.642, by U. S. mail, postage prepaid, and by depositing the same at Minneapolis, Minnesota, directed to all parties on the attached service list.

Kim K. Wagner
Kim K. Wagner

Subscribed and sworn to before me
this 23rd day of April, 2003.

Tobe L. Goldberg
Notary Public

TOBE L. GOLDBERG
NOTARY PUBLIC - MINNESOTA
My Comm. Expires Jan. 31, 2005

62

Dr. Burl W. Haar
Executive Secretary
MN Public Utilities Commission
121 East Seventh Place, Suite 350
St. Paul, MN 55101-2147

Jason Topp, Senior Attorney
Qwest Communications
200 South Fifth Street, Suite 395
Minneapolis, Minnesota 55402

Qwest Communications Director
Interconnection Compliance
1801 California Street
Room 2410
Denver, Colorado 80202

Peter Marker
Assistant Attorney General
900 NCL Tower
445 Minnesota Street
St. Paul, MN 55101

Linda Chavez
Telephone Docketing Coordinator
Minnesota Department of Commerce
85 Seventh Place E., Suite 500
St. Paul, MN 55101-2198

Qwest Law Department
General Counsel
Inter-Connection
1801 California Street
51st Floor
Denver, Colorado 80202

Julia E. Anderson
Assistant Attorney General
525 Park Street
Suite 200
St. Paul, MN 55103-2016

STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	**Chair**
R. Marshall Johnson	**Commissioner**
Gregory Scott	**Commissioner**
Phyllis Reha	**Commissioner**
Ellen Gavin	**Commissioner**

In the matter of the Complaint of Eschelon Telecom of Minnesota, Inc. against Qwest Corporation, formerly known as U S West Communications, Inc.	)))))))	Docket No. P____________________ **COMPLAINT AGAINST QWEST CORPORATION, AND REQUEST FOR EXPEDITED PROCEEDING PURSUANT TO MINN. STAT. 237.462**

Eschelon Telecom of Minnesota, Inc. ("Eschelon") hereby brings this Complaint, consisting of two separate issues, against Qwest Corporation ("Qwest") and alleges as follows:

INTRODUCTION AND PARTIES

1. Eschelon files this Complaint with the Minnesota Public Utilities Commission ("MPUC" or "Commission") in order to obtain immediate relief from the refusal of Qwest to honor its contractual, statutory, and other obligations to provide interconnection at non-discriminatory rates as required under the Telecommunications Act of 1996 (the Act) and state law.

2. Specifically, Qwest charges Eschelon higher rates for UNE-Star than it charges to McLeodUSA. Qwest's refusal to make UNE-Star available to Eschelon at the same rate it is provided to McLeod is contrary to the Act, the parties' Interconnection Agreement (ICA) and Chapter 237 of the Minnesota Statutes. Furthermore, Eschelon is entitled to a refund of payments made for private lines that should have been available to Eschelon as combinations of

64

unbundled network elements known as EELs. Qwest's failure to reprice those circuits violates the Act, Chapter 237 of the Minnesota Statutes and the parties' Interconnection Agreement.

3. Due to the continuous nature of Qwest's violations of law related to these practices, Eschelon requests that the Commission order an expedited hearing pursuant to Minn. Stat. § 237.462, Subd. 6. Eschelon requests such relief as may be just and reasonable and in accordance with applicable Minnesota and federal law, including, without limitation, the initiation of a complaint and investigation by the Commission pursuant to Minn. Stat. § 237.081, Subd. 1(a), the issuance of an administrative penalty order by the Commission pursuant to Minn. Stat. § 237.462, Subds. 1 and 2, the issuance of an Order requiring Qwest to provide UNE-Star to Eschelon at non-discriminatory rates and ordering repricing of special access at EEL rates, and such other relief as the Commission deems appropriate.[1]

4. Eschelon is a competitive local exchange carrier ("CLEC") providing local and interexchange telecommunications services in Qwest's service territory in Minnesota, primarily serving small business customers. As a CLEC in competition with Qwest and other CLECs, Eschelon must establish and retain its reputation as a viable alternative to the incumbent telephone company. In order to compete, Eschelon must avail itself of rights provided under law to gain competitive access to the market.

5. Eschelon's principal place of business is 730 Second Avenue South, Suite 1200, Minneapolis, Minnesota 55402. Eschelon is certified to provide local exchange service in Minnesota pursuant to orders of the MPUC dated July 18, 1996 and April 12, 1999.

6. Eschelon is represented in this proceeding by its attorney:

---

[1] Eschelon also reserves its rights to such private remedies as may be available pursuant to Minnesota law and recognized in Minn. Stat. § 237.462, Subd. 11.

Dennis D. Ahlers
Senior Attorney
Eschelon Telecom, Inc.
730 Second Avenue South, Suite 1200
Minneapolis, MN 55402-2456
Telephone: (612) 436-6249
Facsimile: (612) 436-6349

7. Respondent Qwest is a Colorado corporation, with offices in Minnesota at 200 South Fifth Street, Minneapolis, Minnesota 55402. Qwest is an incumbent local exchange carrier ("ILEC") within the meaning of Section 251(h) of the Telecommunications Act of 1996 (the "Act"), and provides local exchange, exchange access and inter-exchange services in Minnesota subject to the Commission's regulatory authority. Qwest is the dominant monopoly provider of local exchange service in Minnesota.

8. Eschelon has served Qwest with this Complaint through:

Jason Topp, Senior Attorney
Qwest Communications
200 South Fifth Street, Suite 395
Minneapolis, Minnesota 55402
Telephone: (612) 672-8904
Facsimile: (612) 672-8911

Qwest Law Department
General Counsel
Inter-Connection
1801 California Street
51st Floor
Denver, Colorado 80202

Qwest Communications Director
Interconnection Compliance
1801 California Street
Room 2410
Denver, Colorado 80202

JURISDICTION

The MPUC has jurisdiction over this Complaint pursuant to 47 U.S.C. § 251(c)(1)(D) and (3) (authority of state commissions to enforce requirement that Qwest provide facilities and equipment "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory…"), 47 U.S.C. §252(e) (authority of state commissions to enforce interconnection agreements),

66

47 U.S.C. 252(I) and 47 C.F.R. 51.809 (1997), Minn. Stat. §§ 237.081, Subd. 1(a) (investigations), 237.462, and Subds. 1 and 6 (competitive enforcement).

FACTUAL BACKGROUND

A. ESCHELON IS ENTITLED TO THE SAME RATES AS MCLEOD FOR UNE-STAR.

1. On or about October 4, 1999, the Commission approved an Agreement For Local Wireline Network Interconnection and Service Resale (the "Interconnection Agreement" or "Agreement") between Qwest and Exchelon. Relevant excerpts from a true and correct copy of the Interconnection Agreement are attached as Exhibit A-1.[2]

2. The Parties' Interconnection Agreement provides that if the Parties cannot resolve a dispute they may apply to the Commission for resolution. *Id.*, Part A, Section 11. The Agreement further provides that the Parties will seek expedited resolution by the Commission of any such dispute and shall request that resolution occur in no event later than 60 days from the date of submission of the dispute to the Commission. *Id.*

3. On October 1, 2000, Qwest and McLeodUSA entered into the Eighth Amendment to their Interconnection Agreement. Exhibit A-2. That Amendment was filed with the Commission on December 20, 2000 in Docket P5323,421/IC-00-1707, and approved on January 26, 2001. That Amendment provided for UNE-M or UNE-Star[3] at the rates listed in the Addendum to that Amendment.

4. On November 15, 2000, Qwest and Eschelon entered into the Eighth Amendment to their Interconnection Agreement (UNE-Star Amendment). Exhibit A-3. The Amendment was approved by the Commission on January 26, 2001 in Docket No.P5340,421/IC-00-1657. This

[2] All Exhibits are exhibits to the Affidavit of William D. Markert appended as Attachment 1 to this Complaint.
[3] At various times and in various documents, the services at issue are referred to as UNE-E and UNE-M, or UNE-Star. Throughout this document, the term UNE-Star will be used to refer to all three.

Amendment provided for the purchase of UNE-Star at the rates provided in Attachment 3.2 of that Amendment. The rates were the same as the rates in the McLeodUSA UNE-Star Amendment even though the termination dates and the volume commitments differed greatly.

5. On July 31, 2001, Eschelon and Qwest entered into the Twelfth Amendment to their Interconnection Agreement, which allowed Eschelon to purchase switch-based Advanced Intelligent Network (AIN) features, at retail rates, as well as other switch-based features and listing charges to be included in the UNE-Star (referred to in the Amendment as UNE-P) flat rate. Exhibit A-4. Adding additional features into the flat-rated UNE-Star charge of the right to purchase such AIN features as a part of UNE-Star, resulted in a 35-cent increase in the recurring rates for Eschelon. See Amended Attachment 3.2 in Exhibit A-4.

6. On or about September of 2002, McLeodUSA and Qwest entered into an Amendment of their Interconnection Agreement, which amended the pricing of UNE-Star for McLeodUSA. A true and correct copy of the Amendment is attached hereto as Exhibit A-5. The Amendment provided for a reduction of UNE-Star rates in Minnesota from $27.00 per month to $24.50 per month for McLeod. That Amendment was approved by Commission Order dated February 7, 2003, in Docket No. P-5323,421/IC-02-1566.

7. Immediately thereafter, Eschelon asked Qwest to give it the same UNE-Star rates as those made available to McLeodUSA. Qwest has repeatedly refused to do so unless Eschelon agrees to all other terms and conditions of the Qwest/McLeodUSA Amendment. Engels Letter, Exhibit B-5.

8. Eschelon's Interconnection Agreement provides that Qwest must provide network elements to Eschelon on rates, terms, and conditions no less favorable than those provided to itself or any other party. Exhibit A-1, Part A, Part III, Sec. 37, pp. 28-29.

68

9. The prices for UNE-Star contained in the McLeodUSA Agreement and Eschelon agreements were exactly the same, despite these other terms and conditions that Qwest now claims are tied to the prices in the amended agreement. The only difference in the rates that is justified is that the equivalent prices for Eschelon should be 35 cents higher than the McLeodUSA rates due to the AIN Amendment. Therefore, Eschelon's UNE-Star rate recurring rate should be $24.85, compared with the rate of $24.50 for McLeod and instead of the $27.35 currently being charged to Eschelon.

10. Section 252(i) of the Act provides that Qwest must provide network elements to Eschelon at the same rates, terms and conditions as it provides it to McLeodUSA. As the FCC stated in the First Report and Order, CC Docket No. 96-98, released August 8,1996, ¶ 1314 ("First Report"): "In practical terms, this means that a carrier may obtain access to individual elements such as unbundled loops at the same rates, terms, and conditions as contained in any approved agreement."

Furthermore, the FCC stated:

> [W[here an incumbent LEC proposes to treat one carrier differently than another, the incumbent LEC must prove to the state commission that that differential treatment is justified based on the cost to the LEC of providing that element to the carrier.

First Report, ¶ 1317.

11. The rates for UNE-Star are not volume based. If they were the rates originally charged to McLeodUSA and Eschelon for that product would not have been identical. The rates are not tied to the termination date. The termination dates of the McLeodUSA and Eschelon agreements were different in the original agreements, yet the rates were the same. The termination date of the McLeodUSA agreement did not change in the Amendment. The only difference in the services provided is an agreement between Eschelon and Qwest that gives

69

Eschelon the opportunity to order additional features at a flat-rated charge. Eschelon concedes that its rate should be 35 cents higher to reflect that difference.

12. At no time has Qwest requested Commission authority to price UNEs differently based on volumes. The Commission has conducted two exhaustive cost dockets to establish UNE prices, and Qwest did not, at any time during those proceedings, present evidence that volumes purchased should impact price. The Commission never established prices that varied by volume for UNEs including Star.

13. Section 252(i) of the Act and 47 C.F.R. 51.809 of the FCC's rules require that the price made available to McLeodUSA must be available to Eschelon.

14. Section 252 of the Act requires that Qwest make UNE-Star available to Eschelon at nondiscriminatory rates. Qwest refuses to do so. As a consequence, Qwest has overcharged Eschelon approximately $4,145 per month for UNE-Star since September of 2002, and is continuing to do so on an ongoing basis. The Commission should require Qwest to charge Eschelon the McLeodUSA UNE-Star rates and order Qwest to refund the amounts overcharged.

B. ESCHELON IS ENTITLED TO EEL RATES FROM THE TIME OF INSTALLATION OF ITS SPECIAL ACCESS CIRCUITS.

1. An Enhanced Extended Loop or EEL is a combination of a Loop and dedicated interoffice transport; network elements that Eschelon is entitled to purchase and to combine under its Interconnection Agreement. Exhibit 1-A, Part A, Part III: Unbundled Network Elements.

2. On November 5, 1999 the FCC ruled that EELs must be made available to CLECs at unbundled network element prices. *Third Report and Order,* 15 FCC Rcd at 3909. Paras. 480-81 (citing 47 C.F.R. 51.315(b)). The FCC required that ILECs, upon request, must convert or re-price special access circuits into an EEL.

3. In late 1999 and early 2000, Eschelon wanted to purchase this combination of elements to conduct its business in Minnesota. However, Qwest did not provide a process for Eschelon to order EELs or convert its special access circuits to EELs until October, 2001. Prior to that date Qwest instructed Eschelon to order EELs as special access circuits and required Eschelon to pay tariffed retail rates, as opposed to UNE rates, for this combination of network elements.

4. From March 2000 through October 2001, Eschelon purchased 113 special access circuits from Qwest's Minnesota and FCC Private Line Tariff for use as EEL equivalents.

5. Eschelon initially ordered EELs as special access circuits using an Access Service Request (ASR). When Eschelon objected to paying the retail, as opposed to wholesale, rate for this resold service, Qwest responded that Eschelon was supposed to have ordered these circuits on a Local Service Request (LSR), and that by ordering it using an ASR Eschelon had ordered it as an access service for which no wholesale discount was required. When Eschelon pointed out that no matter what form was used to order it the service was being used to provide EELs, Qwest insisted that it was the form used to order the service that dictated the substance and the price.

6. This position was contradicted by Qwest on March 8, 2001, when Qwest issued a notice stating that the ordering process for EELs had been changed. Qwest acknowledged that the "current ordering method for provisioning of EEL products is done via an Access Service Request (ASR). Qwest has modified systems to now accept conversion and provisioning of EEL's(sic) via the Local Service Request (LSR)." Exhibit B-1.

7. Thus Qwest's own notice acknowledged that EELs were properly ordered on an ASR until March of 2001. Qwest's notice also confirmed that whether an order is processed by

use of an ASR or LSR does not define the use or nature of the service. Neither the service, nor the rate changed when the ordering process was changed by Qwest.

8. Qwest claims that it made EELs available in March of 2000. That claim is not valid. While it is true that on March 30, 2000, Eschelon received a notice from Qwest about the availability of EELs (Exhibit B-2).[4] That notice specified that EEL "is only available for new requests (i.e., no conversions of existing services) and is only available if an end user is served out of the following wire centers:" (parenthetical added). It then listed wire centers where EELs were not, in fact, available.[5] Thus, Qwest's announcement specified that existing circuits could not be converted to EELs and that new requests for EELs were only available in certain limited locations. Furthermore, despite this announcement, Qwest continued to instruct Eschelon to order EELs as special access circuits and required Eschelon to pay tariffed as opposed to UNE rates for the combinations.

9. Furthermore, before Qwest would even consider providing EELs, it required that Eschelon enter into an amendment to the Interconnection Agreement even though the ICA provided for such combinations. Thus, Qwest would not honor Eschelon's request unless Eschelon agreed to an unnecessary and one-sided amendment to the Interconnection Agreement. Eschelon refused and demanded its right to EELs under the already existing Agreement and Qwest refused to provide EELs unless a new amendment was signed. Finally, in February 2001, Qwest issued a notice (Exhibit B-3, attached) that conceded that if an existing interconnection agreement contains the elements and rates necessary for the requested combination, no new amendment is necessary. The Qwest notice stated, in part: "...if a Co-Provider's Interconnection

[4] Although the Notice states that the EEL product is available as of February 17, 2000, the Notice was not sent out until March 30, 2000.
[5] In fact, the Notice was erroneous, the wire centers listed were those in which EELs were not available, as opposed to those in which EELs were available.

Agreement contains access to combinations in general, and the Agreement contains all Unbundled Network Elements and associated rates necessary to make the desired combination, an Amendment is not required." This notice once again contradicted Qwest's previous position.

10. In October of 2001, Eschelon was finally able to order and convert EELs in locations desirable to Eschelon. However, Qwest has refused to reprice the previously ordered special access circuits as EELs and refund the difference between the UNE and tariffed rates.

11. Qwest settled exactly the same issue with MCI WorldCom Network Services (WorldCom) under a Confidential Billing Settlement Agreement dated June 29, 2001. Exhibit B-4. As is explained in that Agreement, WorldCom claimed that approximately 2,500 private line circuits provided by Qwest to WorldCom in various states should have been converted to the Unbundled Network Element Platform known as EEL from tariffed services during the time period between September 4, 1997 through the date of the agreement. WorldCom was required to convert its private lines to EELs as part of the agreement and the parties agreed to a payment made by Qwest for past services billed. Eschelon has since also converted its private line circuits in April 2002.

12. Beginning in November of 2001, Eschelon made the request repeatedly to Qwest for a refund of the amounts paid for these circuits but did not received an answer. On February 10, 2003, Eschelon made a request to Patricia A. Engels, Executive Vice President of Wholesale Markets for Qwest. Qwest denied the request. Qwest admitted that the WorldCom agreement includes "a payment and resolution of past disputes regarding the conversion of private line circuits to EELs" but asserted it is not an Interconnection Agreement and therefore is not available for opt-in. Engels Letter (Exhibit B-5) at p. 2.

13. Eschelon has the same basic Interconnection Agreement as WorldCom including the entitlement to combinations like EELs. Qwest agreed to provide WorldCom with a payment as to this issue. Eschelon's identical dispute with Qwest should also result in Qwest's payment of the difference between the price Eschelon paid for these lines and the price it should have paid had Qwest provided Eschelon with combinations (i.e., EELs), as required by the parties' Interconnection Agreements.

14. Eschelon is requesting a refund of $532,225 for Minnesota, for the difference between Qwest's tariffed rates billed and paid by Eschelon and Eschelon's Interconnection Agreement rates for elements that make up an EEL. Eschelon has calculated that from March 2000 through April 30, 2002, Eschelon was billed and paid $839,671.37 for these circuits. Had Eschelon been able to order EELs during this time, it would have only had to pay $307,445.91,or $532,225.46 less than it paid.

C. ESCHELON HAS ATTEMPTED TO RESOLVE THIS ISSUE BEFORE BRINGING THIS MATTER TO THE COMMISSION.

1. As stated Eschelon has contacted Qwest to ask for the rates in the McLeodUSA Amendment. Qwest has taken the position that Eschelon must take all of the terms and conditions of the McLeodUSA Amendment including volume commitments, termination date and other provisions that are unrelated to price. Exhibits B-5 and B-6, Engels Letters.

2. Eschelon has also requested a refund of the difference between the tariffed rate for special access and the EEL rate from March 1, 2000 to October, 2001. Qwest also rejected that request. Exhibits B-5 and B-6. Engels Letters.

QWEST'S CONTINUING VIOLATIONS OF LAW

Qwest's refusal to provide Eschelon UNE-Star at the same rates that the service is provided to McLeodUSA and refusal to refund overcharges for EELs causes significant harm to

Eschelon and its customers and injures the development of a competitive marketplace for telecommunication services in Minnesota.

Qwest benefits by charging and retaining higher rates than it is entitled to. Qwest also benefits to the extent that the marketing efforts of Eschelon are generally delayed or impeded due to unreasonable and uncertain prices for capacity for its network.

Qwest's actions with regard to Eschelon, as detailed above, constitute continuing breaches of the Interconnection Agreement approved by this Commission and continuing violations of state and federal law.

As demonstrated above, Qwest has breached its Interconnection Agreement with Eschelon and state and federal law by, among other things:

(1) Failing to provide UNE-Star to Eschelon at the same, non-discriminatory rate that it provides the service to McLeodUSA.

(2) Failing to provide EELs to Eschelon at the Commission approved prices.

Qwest's continuing breaches of the Interconnection Agreement violates Minn. Stat. § 237.121(a)(4) which prohibits Qwest from refusing to provide a service, product, or facility in accordance with its contracts and the MPUC's rules and orders.

Qwest's breaches of the Interconnection Agreement violate the Act, which requires Qwest to provide interconnection on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms of its Interconnection Agreement. 47 U.S.C. §§ 251(c)(2)(C), (D).

Qwest's breaches further violate the Act by constituting a barrier to Eschelon's entry into the local market in Minnesota, prohibited in 47 U.S.C. § 253.

Qwest's conduct, as described above, harms the public interest, because Eschelon's ability to compete is adversely affected, thereby denying end users the traditional benefits of competition.

Notwithstanding the conduct of Qwest described above, Eschelon has fully and in good faith performed all of its duties and obligations under the Interconnection Agreement, the Act and applicable state law.

REQUEST FOR EXPEDITED HEARING AND THE IMPOSITION OF ADMINISTRATIVE PENALTIES

A. AN EXPEDITED PROCEEDING IS NECESSARY.

The Interconnection Agreement between Qwest and Eschelon recognizes the Commission's continuing jurisdiction to implement and enforce all of the terms and conditions of the Agreement. Exhibit A-1, Section 11.1. Further, the Agreement provides that any dispute arising out of or relating to the Agreement that the Parties themselves cannot resolve, may be submitted to the Commission for resolution. *Id.* The Agreement further provides that the Parties agree to seek expedited resolution by the Commission of any such dispute and shall request that resolution occur in no event later than 60 days from the date of submission of the dispute to the Commission. *Id.*

The Interconnection Agreement provisions in this regard are consistent with Minn. Stat. § 237.462, Subd. 6. That statute provides that the Commission may order an expedited proceeding if the Commission finds it to be in the public interest. In making this determination, the Commission may consider "any evidence of impairment of the provision of telecommunication service subscribers in the state or impairment of the provision of any service or network element."

76

Both under the terms of the Interconnection Agreement and Minnesota Statutes, the Commission should grant an expedited proceeding in this matter. The problems detailed in this Complaint have continued for some time without abatement, with significant harm to Eschelon and Eschelon's customers. Moreover, delay in resolving disputes of this nature inure to the benefit of the incumbent provider, since each day it can impose pricing uncertainty on Eschelon increases the business risk to Eschelon.

RELIEF REQUESTED

WHEREFORE, Eschelon respectfully requests that the Commission:

1. Investigate the issues raised in this Complaint pursuant to Minn. Stat. § 237.081, Subd. 1;
2. Resolve this matter within 60 days in an expedited proceeding, pursuant to the terms of the Interconnection Agreement and Minn. Stat. § 237.462, Subd. 6;
3. Declare that the actions of Qwest detailed above constitute continual violations of its Interconnection Agreement with Eschelon;
4. Declare that the actions of Qwest detailed above constitute continual violations of Minn. Stat. §§ 237.06, 237.121(a)(2) and 237.121(a)(4);
5. Declare that the actions of Qwest detailed above constitute multiple and continual violations of the Act, including 47 U.S.C. 251(c)(2)(D) and (3), and 252 (i) and the relevant rules;
6. Order that Qwest make UNE-Star available to Eschelon at the same rates that it is available to McLeodUSA, back to the date of the date of the McLeodUSA Amendment.
7. Order Qwest to immediately refund to Eschelon the difference between the rate for special access circuits and EELs for all relevant periods.

77

8. Grant Eschelon any and all relief to which it is entitled under the Interconnection Agreement for Qwest's breaches of contract;

9. Assess administrative penalties against Qwest for its repeated violations of state and federal law and the Interconnection Agreement, as authorized by Minn. Stat. § 237.462, Subd. 1; and

10. Grant Eschelon such other and further relief as the Commission deems appropriate.

Dated: April 23, 2003

Respectfully submitted,

Dennis D. Ahlers

Dennis D. Ahlers
Senior Attorney
Eschelon Telecom, Inc.
730 Second Ave. South, Suite 1200
Minneapolis, MN 55402-2456

J. Jeffery Oxley
Vice President and General Counsel
Eschelon Telecom, Inc.
730 Second Avenue South, Suite 1200
Minneapolis, MN 55402-2456
(612) 436-6692

Attorneys for Eschelon Telecom of Minnesota, Inc.

STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	**Chair**
R. Marshall Johnson	**Commissioner**
Gregory Scott	**Commissioner**
Phyllis Reha	**Commissioner**
Ellen Gavin	**Commissioner**

Eschelon Telecom of Minnesota, Inc.)
)
Complainant,)
)
vs.)
)
Qwest Corporation,)
)
Respondent.)
)

Docket No. P____________________

AFFIDAVIT OF WILLIAM D. MARKERT

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

1. I, William D. Markert, being duly sworn, state that I am the Vice President-Network Financial Management for Eschelon Telecom, Inc. (Eschelon).

2. Eschelon and Qwest are parties to an Interconnection Agreement. Attached as Exhibit A-1 is a true and correct copy of excerpts from the Parties' Agreement for Local Wireline Network Interconnection and Service Resale (Interconnection Agreement or Agreement).

3. On November 15, 2000, Qwest and Eschelon entered into an Amendment to the Interconnection Agreement between the Parties to address the provision and pricing of what has been called UNE-E or UNE-Star. Attachment 3.2 to the Amendment contains rates for UNE-Star. Attached as Exhibit A-3 is a true and correct copy of the UNE-Star Amendment to the Interconnection Agreement (UNE-Star Amendment).

4. On July 31, 2001, Eschelon and Qwest entered into an Amendment to their Interconnection Agreement, which amended the rates and features in Attachment 3.2 to the UNE-Star Amendment. This increased the recurring platform rate in the amount of $.35. Attached as Exhibit A-4 is a true and correct copy of the July 31, 2001 Amendment.

5. On or about September of 2002, Qwest and McLeodUSA entered into an amendment to their UNE-Star Amendment that lowered the rates in Attachment 3.2 to that Amendment. A true and correct copy of that Amendment is attached as Exhibit A-5.

6. Eschelon has requested that it be allowed to obtain the same rates for UNE-Star as those provided to McLeodUSA. Qwest has refused.

7. Eschelon estimates that it is paying Qwest approximately $4,145 more per month in Minnesota for UNE-Star that it would pay if it had the same rates as McLeodUSA.

8. From March 2000 through October 2001, Eschelon purchased 113 special access circuits from Qwest under Qwest's Minnesota and FCC Private line tariffs for use as EEL equivalents. Qwest did not offer EELs, did not have a process for ordering them and required an amendment to the Interconnection Agreement before providing EELs, until October of 2001.

9. Qwest refused to reprice the special circuits at wholesale rates or to reprice them at UNE rates despite requests by Eschelon.

10. Eschelon has calculated that from March 2000 through April 30, 2002, Qwest billed Eschelon and Eschelon paid approximately $839,671for these circuits. Had Eschelon been able to order them as EELs, it would have only had to pay $307,446, or $532,225 less than it paid.

11. Attached as Exhibit B-5 is a true and correct copy of a letter from Patricia Engels, Executive Vice President of Wholesale Markets for Qwest, rejecting Eschelon's requests as to these and other issues with Qwest.

12. Attached as Exhibits B-1, B-2 and B-3 are true and correct copies of e-mail notices to Eschelon from Qwest, dated March 8, 2001, March 30, 2000 and February 22, 2001.

13. Attached as Exhibit B-4, is a true and correct copy of the Confidential Billing Settlement Agreement dated June 29, 2001, between MCI WorldCom Network Services and Qwest, which settled the same disagreement between MCI and Qwest.

FURTHER AFFIANT SAYETH NOT.

Dated: April 21, 2003.

William D. Markert

Subscribed and sworn to before me
this 21st day of April 2003.

Notary Public

KIM K. WAGNER
NOTARY PUBLIC - MINNESOTA
MY COMMISSION EXPIRES
JANUARY 31, 2005

80

APPENDIX E

P421/C-03-683

eschelon
telecom, inc.

①

Comm
AG
Carol
Mark
John

RECEIVED
MAY 0 2 2003
MN PUBLIC UTILITIES COMMISSION

May 2, 2003

Dr. Burl Haar
Minnesota Public Utilities Commission
121 7th Place East
Suite 350
St. Paul, MN 55101-2198

Re: In the matter of the Complaint Against Qwest Corporation, and Request for Expedited Proceeding Pursuant to Minn. Stat. § 237.462

Dear Dr. Haar:

Enclosed are an original and 15 copies of the Complaint Against Qwest Corporation, and Request for Expedited Proceeding Pursuant to Minn. Stat. 237.462, in connection with the above-referenced matter. Also enclosed is an affidavit of service.

Please feel free to contact me with any questions.

Sincerely,

Kim K. Wagner

Kim K. Wagner
Senior Legal Secretary
Eschelon Telecom, Inc.
(612) 436-6225

Enclosures

cc: Attached Service List

STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	**Chair**
R. Marshall Johnson	**Commissioner**
Gregory Scott	**Commissioner**
Phyllis Reha	**Commissioner**
Ellen Gavin	**Commissioner**

In the matter of the Complaint of)
Eschelon Telecom of Minnesota, Inc.)
against Qwest Corporation, Inc.)
)
)
)
)

Docket No. P____________________

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Kim K. Wagner, being first duly sworn, deposes and says that on May 2, 2003, at the City of Minneapolis, State of Minnesota, she served the attached Eschelon Telecom, Inc.'s Complaint against Qwest Corporation, and Request for Expedited Proceeding Pursuant to Minn. Stat. 237.452, by U. S. mail, postage prepaid, and by depositing the same at Minneapolis, Minnesota, directed to all parties on the attached service list.

Kim K. Wagner
Kim K. Wagner

Subscribed and sworn to before me
this 2nd day of May, 2003.

Catherine A. Murray
Notary Public

CATHERINE A. MURRAY
NOTARY PUBLIC - MINNESOTA
My Commission Expires Jan. 31, 2005

Dr. Burl W. Haar
Executive Secretary
MN Public Utilities Commission
121 East Seventh Place, Suite 350
St. Paul, MN 55101-2147

Linda Chavez
Telephone Docketing Coordinator
Minnesota Department of Commerce
85 Seventh Place E., Suite 500
St. Paul, MN 55101-2198

Jason Topp, Senior Attorney
Qwest Communications
200 South Fifth Street, Suite 395
Minneapolis, Minnesota 55402

Qwest Law Department
General Counsel
Inter-Connection
1801 California Street
51st Floor
Denver, Colorado 80202

Qwest Communications Director
Interconnection Compliance
1801 California Street
Room 2410
Denver, Colorado 80202

Julia E. Anderson
Assistant Attorney General
525 Park Street
Suite 200
St. Paul, MN 55103-2016

Peter Marker
Assistant Attorney General
900 NCL Tower
445 Minnesota Street
St. Paul, MN 55101

Curt Nelson
Attorney General's Office
900 NCL Tower
445 Minnesota Street
St. Paul, MN 55101-2128

STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	**Chair**
R. Marshall Johnson	**Commissioner**
Gregory Scott	**Commissioner**
Phyllis Reha	**Commissioner**
Ellen Gavin	**Commissioner**

In the matter of the Complaint of Eschelon Telecom of Minnesota, Inc. against Qwest Corporation, formerly known as U S West Communications, Inc.

Docket No. P____________________

COMPLAINT AGAINST QWEST CORPORATION, AND REQUEST FOR EXPEDITED PROCEEDING PURSUANT TO MINN. STAT. 237.462

Eschelon Telecom of Minnesota, Inc. ("Eschelon") hereby brings this Complaint, consisting of two separate issues, against Qwest Corporation ("Qwest") and alleges as follows:

INTRODUCTION AND PARTIES

1. Eschelon files this Complaint with the Minnesota Public Utilities Commission ("MPUC" or "Commission") in order to obtain immediate relief from the refusal of Qwest to honor its contractual and legal obligations to Eschelon, thereby injuring Eschelon, Minnesota consumers, and the development of a competitive telecommunications marketplace in Minnesota. Eschelon's Complaint alleges significant overcharges by Qwest for collocation non-recurring rates, and Qwest's withholding of DMOQ billing credits from Eschelon.

2. Specifically, Qwest overcharged Eschelon for non-recurring rates for 40 amp feeds and space preparation fees when Eschelon built its collocations in Minnesota in 1999 and 2000. Eschelon is due a refund of $425,959, plus interest, from Qwest, which Qwest has refused to pay. In addition, Qwest has refused to provide Eschelon with all of the DMOQ billing credits due under the Parties' February 2000 Stipulation and Agreement and August 25, 1999

Interconnection Agreement. Eschelon is due $105,048, plus interest, in DMOQ billing credits from Qwest related to UNE-E billing inaccuracies from March 2002 through December 2002.

3. Due to the continuous nature of Qwest's violations of law related to these issues, Eschelon requests that the Commission order an expedited hearing pursuant to Minn. Stat. § 237.462, Subd. 6.

4. Eschelon requests such relief as may be just and reasonable and in accordance with applicable Minnesota and federal law, including, without limitation, the initiation of a complaint and investigation by the Commission pursuant to Minn. Stat. § 237.081, Subd. 1(a); the issuance of an administrative penalty order by the Commission pursuant to Minn. Stat. § 237.462, Subds. 1 and 2; the issuance of an Order requiring Qwest to refund $425,959, plus interest, in collocation overcharges; the issuance of an Order requiring Qwest to refund $105,048, plus interest, in DMOQ billing credits for March through December 2002; the issuance of an Order requiring Qwest to include in its DMOQ credit calculation for billing accuracy beginning in March 2002, and going forward, all UNE-E bills inaccurately billed at resale rates; and such other relief as the Commission deems appropriate.[1]

5. Eschelon is a competitive local exchange carrier ("CLEC") providing local and interexchange telecommunications services in Qwest's service territory in Minnesota, primarily serving small business customers.

6. Eschelon's principal place of business is 730 Second Avenue South, Suite 1200, Minneapolis, Minnesota 55402. Eschelon is certified to provide local exchange service in Minnesota pursuant to Orders of the MPUC, dated July 18, 1996 and April 12, 1999.

7. Eschelon is represented in this proceeding by its attorney:

---

1 Eschelon also reserves its rights to such private remedies as may be available pursuant to Minnesota law and recognized in Minn. Stat. § 237.462, Subd. 11.

Brent Vanderlinden, Attorney
Eschelon Telecom, Inc.
730 Second Avenue South, Suite 1200
Minneapolis, MN 55402-2456
Telephone: (612) 436-6287
Facsimile: (612) 436-6387

8. Respondent Qwest is a Colorado corporation, with offices in Minnesota at 200 South Fifth Street, Minneapolis, Minnesota 55402. Qwest is an incumbent local exchange carrier ("ILEC") within the meaning of Section 251(h) of the Telecommunications Act of 1996 (the "Act"), and provides local exchange, exchange access and inter-exchange services in Minnesota subject to the Commission's regulatory authority. Qwest is the dominant monopoly provider of local exchange service in Minnesota.

9. Eschelon has served Qwest with this Complaint through:

Jason Topp, Senior Attorney
Qwest Communications
200 South Fifth Street, Suite 395
Minneapolis, Minnesota 55402
Telephone: (612) 672-8904
Facsimile: (612) 672-8911

Qwest Law Department
General Counsel
Inter-Connection
1801 California Street
51st Floor
Denver, Colorado 80202

Qwest Communications Director
Inter-Connection Compliance
1801 California St., Room 2410
Denver, Colorado 80202

JURISDICTION

The MPUC has jurisdiction over this Complaint pursuant to 47 U.S.C. § 252(e) (authority of state commissions to enforce interconnection agreements), Minn. Stat. §§ 237.081, Subd. 1(a) (investigations), 237.462, Subds. 1 and 6 (competitive enforcement), the Agreement for Local Wireline Network Interconnection and Service Resale between Eschelon and Qwest, § 11.1 and the Stipulation and Agreement of the parties, Section F.

96

FACTUAL BACKGROUND

A. ESCHELON IS ENTITLED TO A REFUND OF $425,959, PLUS INTEREST, FROM QWEST FOR NON-RECURRING COLLOCATION OVERCHARGES IN 1999 AND 2000.

1. On or about October 4, 1999, the Commission approved an Agreement For Local Wireline Network Interconnection and Service Resale (the "Interconnection Agreement" or "Agreement") between Qwest and Eschelon. Relevant excerpts from a true and correct copy of the Interconnection Agreement and Amendments are attached as exhibits.[2]

2. The Parties' Interconnection Agreement provides that if the Parties cannot resolve a dispute they may apply to the Commission for resolution. Exhibit A-1, Part A, Section 11. The Agreement further provides that the Parties will seek expedited resolution by the Commission of any such dispute and shall request that resolution occur in no event later than 60 days from the date of submission of the dispute to the Commission. *Id.*

3. The Agreement includes a table for "Physical and Virtual Collocation Prices" which states that "Rates are interim and subject to true up based on further Commission proceedings." Exhibit A-2.

4. On January 24, 2000, Qwest and Eschelon entered into the Second Amendment to their Interconnection Agreement. Exhibit A-3. The Amendment was filed with the Commission on January 27, 2000. The Amendment replaced the collocation terms and pricing in the Agreement with amended collocation terms and pricing. *Id.*, page 1. The Amendment reiterated the "interim/subject to true up" nature of the collocation rates with the following language:

> USW will recover MPUC approved Collocation costs through both recurring and nonrecurring charges. . . . All costs will be those costs and cost elements approved by the MPUC . . . To the extent that a rate element or rate is not allowed under the current MPUC rulings or in any MPUC Cost Order, the MPUC's determination will govern.

[2] All Exhibits are exhibits to the Affidavit of William D. Markert appended as Attachment 1 to this Complaint.

87

Id., Section 6.1.

5. In 1999 and 2000, Eschelon completed 15 collocation build-outs, for which Qwest billed (and Eschelon paid) $397,557 in non-recurring charges for 40 amp power delivery. Exhibit A-4. Qwest's charges were not based on Commission approved rates.

6. In its May 3, 1999, Order Resolving Cost Methodology, Requiring Compliance Filing, and Initiating Deaveraging Proceeding [Generic Cost Case], the Commission clearly stated that collocation prices are to be set following the AT&T/MCI collocation cost model (CCM).[3] Therefore, Qwest should have used the CCM to establish non-recurring charges for 40 amp power delivery. Had Qwest done so, Eschelon would have been billed only $11,718 in non-recurring charges for 40 amp power delivery to its 15 collocation build-outs. Exhibit A-4. Therefore, Eschelon is entitled to a refund from Qwest in the amount of $385,839, plus interest. *Id.*

7. Four of Eschelon's fifteen collocation build-outs were cageless, for which Qwest billed (and Eschelon paid) $41,804 in space preparation fees. Exhibit A-5. Had Qwest's charges been based on Commission approved rates, Eschelon would have been billed only $1,684. *Id.* Therefore, Eschelon is entitled to a refund from Qwest in the amount of $40,120, plus interest. *Id.*

8. In Docket No. P-421/C-01-1896, the Commission ordered Qwest to issue a refund of non-recurring collocation overcharges to Onvoy Inc., including 40 amp feeds and cageless collocation space preparation fees, plus 6% simple interest on the refund. Eschelon is seeking a

[3] The exceptions – Fiber Splicing; Essential AC Power; Essential AC Power Feed; and Composite Clock – which the Commission authorized US West to price using US West's cost model, in a later order issued on March 15, 2000, are inapplicable in this case.

refund in this Complaint based on the same rationale that Onvoy was awarded a refund. Therefore, Eschelon requests 6% simple interest on its refunds.

9. Eschelon detailed its refund request of non-recurring collocation overcharges for 40 amp feeds in a letter to Qwest, dated January 31, 2003. Exhibit A-4. On February 10, 2003, Eschelon reiterated this request to Patricia A. Engels, Executive Vice President of Wholesale Markets for Qwest. Exhibit A-6. Qwest denied the request in a letter from Ms. Engels, dated April 1, 2003. Exhibit A-7. In a phone conversation between Eschelon and Qwest on April 4, 2003, Eschelon discussed Qwest's overcharges for cageless collocation space preparation fees, as had been ordered for by the MPUC for Onvoy. To date, Qwest has not responded to or acted on these overcharges.

10. Qwest denied Eschelon's refund requests for non-recurring collocation overcharges based on a settlement agreement[4] between the parties, stating, "The settlement agreement between Qwest and Eschelon, dated April 2, 2001, settles fully all claims related to collocation non-recurring charges billed prior to March 1, 2001." Exhibit A-7 at 9. However, this statement is incorrect with respect to Eschelon's request for a refund of overcharges for 40 amp feeds and space preparation fees.[5]

11. The settlement resolved five categories of claims, the second of which addressed collocation charges. Exhibit A-8. Eschelon agreed to release Qwest from:

> any claims that [Eschelon] can or could have brought against Qwest related to the following: . . . (b) for all periods prior to March 1, 2001, true-ups pursuant to decisions of the Minnesota Public Utilities Commission in Minnesota docket number P-442, 5321, 3167, 466, 421/CI-96-1540, including for collocation and unbundled network elements . . .

---

[4] The "Confidential Second Amendment to Confidential/Trade Secret Stipulation," attached hereto as Exhibit A-8, is now a public document.

[5] Eschelon agrees that its refund request for collocation non-recurring charges for 20 amp feeds was resolved in the settlement agreement.

Id. at 1-2. This language limited the settlement's coverage to collocation components that were explicitly priced in the Generic Cost Case.

12. Non-recurring collocation charges for 40 amp feeds and space preparation fees were not priced in the Generic Cost Case. In fact, in the Onvoy case, Qwest *expressly acknowledged* that non-recurring collocation charges for 40 amp feeds and space preparation fees were not priced in the Generic Cost Case. Exhibit A-9 at 8 ¶27, 10 ¶38 & fn 31, and 16 ¶62. Therefore, there is no legal or factual basis for Qwest's ongoing refusal to refund to Eschelon $425,959, plus interest, for collocation overcharges

B. ESCHELON IS ENTITLED TO $105,048, PLUS INTEREST, IN DMOQ BILLING CREDITS FROM QWEST FOR UNE-E BILLING INACCURACIES FROM MARCH 2002 THROUGH DECEMBER 2002.

1. The Interconnection Agreement sets forth certain Direct Measures of Quality (DMOQs) for Qwest service, together with credits or other remedies if Qwest fails to meet those DMOQs. These remedies call for, among other things, Overall Performance Index credits to Eschelon as set forth in Attachment 11, Appendix B of the Agreement. Exhibit B-1.

2. Qwest and Eschelon also entered into a Stipulation and Agreement (Stipulation) on or about February 29, 2000. Exhibit B-2. The Commission accepted the Stipulation and Agreement in an Order, dated June 28, 2000. The Stipulation, among other things, amended the DMOQ provisions of the Parties' Interconnection Agreement.

3. The Stipulation provides for three metrics to be measured each month: (1) provisioning commitments met, (2) time to restore-out of service and (3) billing accuracy – adjustments for errors. Each of the three DMOQs is assigned a Performance Index Rating based on the level of compliance achieved by Qwest. The Performance Index Rating is then converted to a numerical value and an overall Performance Index is calculated on a monthly basis. Exhibit

B-1 at 12-13, Exhibit B-2 at 3. If the overall Performance Index for the month is a negative number, this indicates that Qwest's overall performance for the month is less than the required objective; in which case the Performance Index is used as a percentage discount against the previous month's total bill from Qwest to determine the credit due to Eschelon. Exhibit B-2 at 3. The Stipulation requires Qwest to pay Eschelon's undisputed Overall Performance Credit claims within 30 days of submission by Eschelon.

4. Eschelon submitted claims to Qwest for performance billing credits for the months of March through June, 2002. Exhibit B-3. Qwest disputed each of these claims and refused to provide the credits claimed by Eschelon. After disputing these claims with Qwest for several months,[6] with no success, Eschelon submitted claims to Qwest for performance billing credits for the remainder of 2002. Exhibit B-3. In response, Qwest agreed to provide Eschelon with $52,702 in undisputed DMOQ credits, but refused to include an entire category of billing errors in this calculation, namely UNE-Eschelon ("UNE-E") bill credits. Exhibit B-5. The amount of DMOQ credits withheld by Qwest from March 2002 through December 2002 totals $105,048. Exhibit B-3.

5. The primary dispute concerns metric B-4, "Billing Accuracy-Adjustments for Errors". Under this metric the parties have agreed to divide the total revenue billed without error by the total billed revenue billed in the reporting period (month). Qwest has refused to provide DMOQ credits for UNE-E billing inaccuracies.

6. UNE-E is a product Qwest provides to Eschelon pursuant to the Eighth Amendment to the Parties' Interconnection Agreement (Amendment) entered into on or about December 4, 2000. Exhibit B-6. The Commission approved this Amendment in an Order, dated January 26, 2001. Pursuant to this Amendment, Qwest agreed to provide Eschelon with a

platform product that Qwest initially referred to as UNE-Eschelon or UNE-E (and Qwest now refers to as UNE-Star). Eschelon purchased UNE-E as a substitute for UNE-Platform ("UNE-P"), Qwest's official platform product.[7]

7. Qwest agreed to convert Eschelon's resale base to UNE-E but indicated it could not complete the conversion for a few months. In the short-term, Qwest told Eschelon to order UNE-E through the existing resale process. Under this temporary process, Qwest stated it would continue to bill Eschelon the resale rate and then compare the end-of-month billed revenues to the UNE-E rates and pay Eschelon the difference. Qwest continues to use this temporary process today – over two years after the UNE-E Amendment date – despite Qwest's promises to develop a billing system to accurately bill Eschelon for UNE-E lines.

8. Qwest's continued billing for UNE-E at the incorrect resale rate has resulted in Eschelon receiving inaccurate UNE-E bills each month and being required to expend a large amount of resources attempting to reconcile the bills with what should have been billed by Qwest. For each month in question, March 2002 through December 2002, Qwest has presented Eschelon with UNE-E bills that do not reflect any of the UNE-E rates in the UNE-E Interconnection Agreement Amendment.[8] Instead, the bills show rates that reflect the retail rate minus the wholesale discount. A UNE-E credit must then be determined by applying the UNE-E rates to the UNE-E product quantities Eschelon has ordered.

9. Because the bills from Qwest reflect resale rates, rather than UNE-E rates, literally 100% of Qwest's UNE-E bills to Eschelon were inaccurate in 2002. This particular

---

[6] The parties' exchange of correspondence concerning DMOQ credits is attached as Exhibit B-4.

[7] When Eschelon initially attempted to order UNE-P from Qwest in Minnesota, the product had numerous problems. When Eschelon placed trial orders, the orders resulted in denial and loss of features, unclear and changing processes and customer-affecting service problems. The problems were so severe that Eschelon could not utilize the product. In response to these problems, Qwest offered Eschelon a different product it called UNE-E.

concern was raised by Eschelon in two recent regulatory proceedings. In the Minnesota Public Utilities Commission's investigation of Qwest's 271 filing, the Administrative Law Judge found "conclusively that UNE-Star does not meet the standards for a UNE-P offering (particularly with respect to billing accuracy . . .)." MN PUC Docket No. P-421/CI-01-1371, ALJ's Report at 35, ¶ 100. Exhibit B-3. Likewise, in the Arizona Commerce Commission's investigation of Qwest's 271 filing, the ACC staff recommended that "Until the issue with embedded accounts is resolved, Qwest should be required to count [UNE-E billing] as an error or an inaccurate bill for purposes of calculating its billing measurements. ACC Docket No. T-00000A-97-0238, Staff Report at 47, ¶ 216. Exhibit B-3.

10. Despite the fact Qwest admits its UNE-E bills to Eschelon are inaccurate, it refuses to include these bills in the billing accuracy metric agreed upon by the parties. Qwest alleges that "Qwest and Eschelon have agreed upon the process for the migration of accounts over to UNE-P and were fully aware of the timeframe for the conversion process." Letter from Vicki Keller to David Frame, dated August 20, 2002. Exhibit B-4. Qwest has stated that it will not include UNE-E billing inaccuracies in the DMOQ credit calculation because it does not believe the UNE-E rate is being billed in error. *Id.* Qwest stated on November 14, 2002, and reiterated on April 1, 2003, that "Qwest will litigate this issue if necessary." Exhibit B-4, Exhibit A-7 at 10.

11. Qwest has a duty to provide Eschelon with accurate UNE-E bills, regardless of whether UNE-E lines are eventually converted to UNE-P lines. The UNE-E Amendment expressly provides that it "may not be further amended or altered except by written instrument executed by an authorized representative of both Parties." Exhibit B-6 at 2 ¶1.8. The UNE-E

---

[8] Bills for months prior to March 2002 contained this same error. However, Eschelon had entered into an agreement with Qwest to forego DMOQ sums due for those months.

93

Amendment also expressly provides that, except as modified by the amendment, the underlying interconnection agreement "shall remain in full force and effect." *Id.* The UNE-E Amendment does not modify the billing provisions of the underlying agreement, which require Qwest to accurately bill Eschelon for charges that Eschelon incurs as a result of purchasing products and services from Qwest. Exhibit B-1 at ¶12. The parties have not entered into a subsequent amendment that modifies the billing provisions of the underlying agreement, which require Qwest to accurately bill Eschelon for charges that Eschelon incurs as a result of purchasing products and services from Qwest. Therefore, Qwest's past and on-going UNE-E billing inaccuracies are justly addressed through the payment of DMOQ credits to Eschelon.

C. ESCHELON HAS ATTEMPTED TO RESOLVE THESE ISSUES BEFORE BRINGING THIS MATTER TO THE COMMISSION.

1. As has been demonstrated above, Eschelon has initiated numerous contacts with Qwest in an attempt to address the issues raised in this Complaint.

2. In a February 10, 2003, letter from Eschelon President Richard Smith to Patricia A. Engels, Executive Vice President of Wholesale Markets for Qwest, Eschelon reiterated its requests for the collocation refund and DMOQ credits. Exhibit A-6. Qwest denied Eschelon's requests on April 1, 2003. Exhibit A-7.

<u>QWEST'S CONTINUING VIOLATIONS OF LAW</u>

Qwest's refusal to refund collocation overcharges and DMOQ credits causes significant harm to Eschelon and its customers and injures the development of a competitive marketplace for telecommunication services in Minnesota. Qwest benefits by charging and retaining higher rates than it is entitled to. Qwest also benefits to the extent that the marketing efforts of Eschelon are impeded due to Qwest unreasonably withholding these refunds and credits from Eschelon.

Qwest's actions with regard to Eschelon, as detailed above, constitute continuing breaches of the Interconnection Agreement approved by this Commission and continuing violations of state and federal law.

As demonstrated above, Qwest has breached its Interconnection Agreement with Eschelon and state and federal law. Qwest's continuing breaches of the Interconnection Agreement violates Minn. Stat. § 237.121(a)(4) which prohibits Qwest from refusing to provide a service, product, or facility in accordance with its contracts and the MPUC's rules and orders. Qwest's breaches of the Interconnection Agreement violate federal law, which requires Qwest to provide interconnection on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms of its Interconnection Agreement. 47 U.S.C. §§ 251(c)(2)(C), (D).

Notwithstanding the conduct of Qwest described above, Eschelon has fully and in good faith performed all of its duties and obligations under the Interconnection Agreement, the Act and applicable state law.

REQUEST FOR EXPEDITED HEARING

1. The Interconnection Agreement between Qwest and Eschelon recognizes the Commission's continuing jurisdiction to implement and enforce all of the terms and conditions of the Agreement. Exhibit A-1 at 14, ¶11.1. Further, the Agreement provides that any dispute arising out of or relating to the Agreement that the Parties themselves cannot resolve, may be submitted to the Commission for resolution. *Id.* The Agreement further provides that the Parties agree to seek expedited resolution by the Commission of any such dispute and shall request that resolution occur in no event later than 60 days from the date of submission of the dispute to the Commission. *Id.*

2. The Interconnection Agreement provisions in this regard are consistent with Minn. Stat. § 237.462, Subd. 6. That statute provides that the Commission may order an expedited proceeding if the Commission finds it to be in the public interest. In making this determination, the Commission may consider "any evidence of impairment of the provision of telecommunication service subscribers in the state or impairment of the provision of any service or network element." *Id.*

3. Both under the terms of the Interconnection Agreement and Minnesota Statutes, the Commission should grant an expedited proceeding in this matter. The problems detailed in this Complaint continue without abatement, with significant harm to Eschelon. In particular, the DMOQs should act as an incentive to Qwest to provide accurate bills as required by the Parties' Interconnection Agreement. But, if Qwest can provide inaccurate bills with no consequence under the DMOQs, it is unlikely to fix this billing problem or future billing problems. Meanwhile, Eschelon continues to receive inaccurate bills that require significant resources to reconcile each month and always remain an estimate of what is actually due.

RELIEF REQUESTED

WHEREFORE, Eschelon respectfully requests that the Commission:

1. Investigate the issues raised in this Complaint pursuant to Minn. Stat. § 237.081, Subd. 1;
2. Resolve this matter within 60 days in an expedited proceeding, pursuant to the terms of the Interconnection Agreement and Minn. Stat. § 237.462, Subd. 6;
3. Declare that the actions of Qwest detailed above constitute repeated and continuing violations of its Interconnection Agreement with Eschelon;
4. Order Qwest to immediately refund to Eschelon the overcharges for collocation non-recurring 40 amp feeds and space preparation fees, with interest;

96

5. Order that Qwest include in its DMOQ credit calculation for billing accuracy beginning in March 2002, and going forward, all UNE-E bills inaccurately billed at resale rates, as required by the Parties' Stipulation and Interconnection Agreement;

6. Order Qwest to immediately credit to Eschelon all amounts due for DMOQ credits for the months of March 2002 through the present, with interest;

7. Grant Eschelon any and all relief to which it is entitled under the Interconnection Agreement for Qwest's breaches of contract;

8. Assess administrative penalties against Qwest for its repeated and continuing violations of state and federal law and the Interconnection Agreement, as authorized by Minn. Stat. § 237.462, Subd. 1; and

9. Grant Eschelon such other and further relief as the Commission deems appropriate.

Dated: May 2, 2003

Respectfully submitted,

Brent VanderLinden

Brent Vanderlinden
Attorney
Eschelon Telecom, Inc.
730 Second Ave. South, Suite 1200
Minneapolis, MN 55402-2456
(612) 436-6287

J. Jeffery Oxley
Vice President and General Counsel
Eschelon Telecom, Inc.
730 Second Avenue South, Suite 1200
Minneapolis, MN 55402-2456
(612) 436-6692

Attorneys for Eschelon Telecom, Inc.

STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	**Chair**
R. Marshall Johnson	**Commissioner**
Gregory Scott	**Commissioner**
Phyllis Reha	**Commissioner**
Ellen Gavin	**Commissioner**

Eschelon Telecom of Minnesota, Inc.)
)
Complainant,)
)
vs.)
)
Qwest Corporation,)
)
Respondent.)
)

Docket No. P______________________

AFFIDAVIT OF WILLIAM D. MARKERT

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

1. I, William D. Markert, being duly sworn, state that I am the Vice President-Network Financial Management for Eschelon Telecom, Inc. (Eschelon).

2. Eschelon and Qwest are parties to an Interconnection Agreement. Attached as Exhibit A-1 is a true and correct copy of excerpts from the Parties' Agreement for Local Wireline Network Interconnection and Service Resale (Interconnection Agreement or Agreement).

3. The Parties' Interconnection Agreement provides that if the Parties cannot resolve a dispute they may apply to the Commission for resolution. The Agreement further provides that the Parties will seek expedited resolution by the Commission of any such dispute and shall request that resolution occur in no event later than 60 days from the date of submission of the dispute to the Commission.

4. The Agreement includes a table for "Physical and Virtual Collocation Prices" which states that "Rates are interim and subject to true up based on further Commission proceedings." Attached as Exhibit A-2 is a true and correct copy of. the table.

5. On January 24, 2000, Qwest and Eschelon entered into the Second Amendment to their Interconnection Agreement. Attached as Exhibit A-3 is a true and correct copy of the Amendment. The Amendment was filed with the Commission on January 27, 2000.

6. In 1999 and 2000, Eschelon completed 15 collocation build-outs, for which Qwest billed (and Eschelon paid) approximately $397,557 in non-recurring charges for 40 amp power delivery. Attached as Exhibit A-4 is a true and correct copy of my letter to Jean Novak, dated January 31, 2003, detailing these charges. Qwest's charges were not based on Commission approved rates.

7. Qwest should have used the CCM to establish non-recurring charges for 40 amp power delivery. Had Qwest done so, Eschelon would have been billed approximately $11,718 in non-recurring charges for 40 amp power delivery to its 15 collocation build-outs. Therefore, Eschelon is entitled to a refund from Qwest in the amount of $385,839, plus interest.

8. Four of Eschelon's fifteen collocation build-outs were cageless, for which Qwest billed (and Eschelon paid) approximately $41,804 in space preparation fees. Attached as Exhibit A-5 is a true and correct copy of my spreadsheet detailing these charges. Had Qwest's charges been based on Commission approved rates, Eschelon would have been billed approximately $1,684. Therefore, Eschelon is entitled to a refund from Qwest in the amount of $40,120, plus interest.

9. Eschelon detailed its refund request of non-recurring collocation overcharges for 40 amp feeds in a letter to Qwest, dated January 31, 2003. Attached as Exhibit A-4. On February 10, 2003, Eschelon reiterated this request to Patricia A. Engels, Executive Vice President of Wholesale Markets for Qwest. Attached as Exhibit A-6 is a true and correct copy of that letter. Qwest denied the request in a letter from Ms. Engels, dated April 1, 2003. Attached as Exhibit A-7 is a true and correct copy of that letter.

10. In a phone conversation between Eschelon and Qwest on April 4, 2003, Eschelon discussed Qwest's overcharges for cageless collocation space preparation fees, as had been ordered for by the MPUC for Onvoy. To date, Qwest has not responded to or acted on these overcharges.

11. Attached as Exhibit A-8 is a true and correct copy of the "Confidential Second Amendment to Confidential/Trade Secret Stipulation" between Qwest and Eschelon, which is now a public document.

12. Attached as Exhibit A-9 is a true and correct copy of relevant portions of the ALJ's Report in the Onvoy case, MPUC Docket No. P-421/C-01-1896.

13. The Interconnection Agreement sets forth certain Direct Measures of Quality (DMOQs) for Qwest service, together with credits or other remedies if Qwest fails to meet those DMOQs. These remedies call for, among other things, Overall Performance Index credits to Eschelon as set forth in Attachment 11, Appendix B of the Agreement. Attached as Exhibit B-1 is a true and correct copy of relevant portions of the Agreement.

14. Qwest and Eschelon also entered into a Stipulation and Agreement (Stipulation) on or about February 29, 2000. Attached as Exhibit B-2 is a true and correct copy the Stipulation. The Commission accepted the Stipulation and Agreement in an Order, dated June 28, 2000. The Stipulation, among other things, amended the DMOQ provisions of the Parties' Interconnection Agreement.

15. Eschelon submitted claims to Qwest for DMOQ credits for the months of March through June, 2002. Attached as Exhibit B-3 is a true and correct copy of my letter (including attachments) to Jean Novak, dated March 13, 2003, detailing Eschelon's DMOQ credit requests from March 2002 through December 2002. Qwest disputed each of these claims and refused to provide the credits claimed by Eschelon.

16. Attached as Exhibit B-4 is a true and correct copy of Qwest's and Eschelon's exchange of correspondence concerning DMOQ credits.

17. Qwest agreed to provide Eschelon with $52,702 in undisputed DMOQ credits, but refused to include DMOQ credits related to UNE-Eschelon ("UNE-E") billing errors. Attached as Exhibit B-5 is a true and correct copy of Qwest's March 28, 2003 letter (including attachments) detailing the DMOQ credits provided. The amount of DMOQ credits withheld by Qwest from March 2002 through December 2002 totals approximately $105,048.

18. The primary dispute between Eschelon and Qwest regarding DMOQ credits concerns metric B-4, "Billing Accuracy-Adjustments for Errors". Under this metric the parties have agreed to divide the total revenue billed without error by the total billed revenue billed in the reporting period (month). Qwest has refused to provide DMOQ credits for UNE-E billing inaccuracies.

19. UNE-E is a product Qwest provides to Eschelon pursuant to the Eighth Amendment to the Parties' Interconnection Agreement (Amendment) entered into on or about December 4, 2000. Attached as Exhibit B-6 is a true and correct copy of this Amendment. The Commission approved this Amendment in an Order, dated January 26, 2001. Pursuant to this Amendment, Qwest agreed to provide Eschelon with a platform product that Qwest initially referred to as UNE-Eschelon or UNE-E (and Qwest now refers to as UNE-Star). Eschelon purchased UNE-E as a substitute for UNE-Platform ("UNE-P"), Qwest's official platform product.

20. When Eschelon initially attempted to order UNE-P from Qwest in Minnesota, the product had numerous problems. When Eschelon placed trial orders, the orders resulted in denial and loss of features, unclear and changing processes and customer-affecting service problems. The problems were so severe that Eschelon could not utilize the product. In response to these problems, Qwest offered Eschelon a different product it called UNE-E.

21. Qwest agreed to convert Eschelon's resale base to UNE-E but indicated it could not complete the conversion for a few months. In the short-term, Qwest told Eschelon to order UNE-E through the existing resale process. Under this temporary process, Qwest stated it would continue to bill Eschelon the resale rate and then compare the end-of-month billed revenues to the UNE-E rates and pay Eschelon the difference. Qwest continues to use this temporary process today – over two years after the UNE-E Amendment date – despite Qwest's promises to develop a billing system to accurately bill Eschelon for UNE-E lines.

22. Qwest's continued billing for UNE-E at the incorrect resale rate has resulted in Eschelon receiving inaccurate UNE-E bills each month and being required to expend a large amount of resources attempting to reconcile the bills with what should have been billed by Qwest. For each month in question, March 2002 through December 2002, Qwest has presented Eschelon with UNE-E bills that do not reflect any of the UNE-E rates in the UNE-E Interconnection Agreement Amendment. Instead, the bills show rates that reflect the retail rate minus the wholesale discount. A UNE-E credit must then be determined by applying the UNE-E rates to the UNE-E product quantities Eschelon has ordered. Because the bills from Qwest reflect resale rates, rather than UNE-E rates, literally 100% of Qwest's UNE-E bills to Eschelon were inaccurate in 2002.

FURTHER AFFIANT SAYETH NOT.

Dated: May 2, 2003.

WD Markert

William D. Markert

Subscribed and sworn to before me
this 2nd day of May 2003.

Kim K Wagner

Notary Public

KIM K. WAGNER
NOTARY PUBLIC • MINNESOTA
MY COMMISSION EXPIRES
JANUARY 31, 2005

101

APPENDIX F

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of a Formal Complaint by McLeod Telemanagement, Inc. against US WEST Communications, Inc. regarding the Sale of Centron/Centrex Services

ISSUE DATE: April 1, 1998

DOCKET NO. P-421/C-96-968

ORDER APPROVING TARIFF WITH MODIFICATION AND REQUIRING REFUND

PROCEDURAL HISTORY

On August 20, 1996, McLeod Telemanagement, Inc. (now known as McLeodUSA Telecommunications Services, Inc.) filed a complaint alleging that US WEST Communications, Inc. (US WEST) was imposing discriminatory and anti-competitive terms on McLeod's purchase and resale of Centron services.

On October 24, 1996, the Commission issued its ORDER REQUIRING ANSWER TO COMPLAINT. In that Order the Commission found that there were reasonable grounds to investigate McLeod's allegations and required US WEST to submit an answer to the complaint.

On July 10, 1997, the Commission issued its ORDER REQUIRING TARIFF FILINGS. In that Order the Commission required US WEST to file two new tariffs within 20 days of the date of the Order. The first tariff would offer a "chip-in" feature to allow new customers to retain their telephone numbers as they enter preexisting Centron common blocks. The second tariff would reduce the rate US WEST charges Centron resellers for Directory Listing Services to the rate US WEST charges its own Centron end users. The first of the required tariffs is the subject of this proceeding.

On July 29, 1997, US WEST filed a Compliance Filing to Establish Chip-In. The tariff filing included factual support; a price list; cost information; and revenue effect. US WEST supplemented its tariff filing on August 7, 1997, and February 17, 1998.

102

Between August 7, 1997, and March 3, 1998, comments and reply comments on the tariff were submitted by McLeodUSA Telecommunications Services, Inc. (McLeod), US WEST, the Department of Public Service (the Department), and Frontier Telemanagement, Inc. (Frontier), another Centron reseller.

On March 10, 1998, the matter came before the Commission for consideration.

FINDINGS AND CONCLUSIONS

I. FACTUAL BACKGROUND

US WEST's Centron service enables customers to buy Centron common blocks, which are analogous to PBX boxes. A common block allows the US WEST system to link with the in-house dialing and features which the Centron customer has obtained. Customers who wish to purchase Centron from US WEST must buy blocks of 50 or more lines. Resellers such as McLeod or Frontier buy Centron common blocks and resell them to small businesses with fewer than 50 lines.

Prior to the July filing of US WEST's chip-in tariff, customers who wished to join pre-existing Centron blocks without changing their telephone numbers would use Automatic Call Transfer (ACT) service. To implement ACT, US WEST as the underlying Centron carrier would set up an ACT line for each telephone number; the line would forward calls made to the original number over to the newly assigned Centron number. As a result of US WEST's chip-in tariff filing, customers' previous numbers can be "chipped-in" to the Centron common block by means of central office computer changes. All agree that chip-in is more efficient than ACT, avoids ACT's technical inadequacies, and accomplishes the transfer without the use of two telephone numbers for each ACT customer.

For the installation of a customer or customers into Centron service, US WEST charges a service order fee of $83 per customer location, plus $18 per additional line. US WEST also charges a nonrecurring Centron common block charge of $350, plus a $75 per month recurring common block charge. Under the chip-in tariff, US WEST began charging an additional $80 per order for lines chipped-in to the common block (up to a limit of 20 customers per single order). US WEST states that this charge covers costs not covered in the common block charge or installation charge, including: service and billing for closing out the customer's 1FB (business) account; service order and billing costs for adding the customer's account information to the Centron account; translation costs to remove the service from the switch as a 1FB; and other translation costs.

US WEST does not currently charge for the chip-in function in any other state in its 14 state service territory. Since the filing of McLeod's complaint, US WEST has filed proposed tariffs to charge for the chip-in function in Oregon and Washington.

II. GOVERNING STATUTES

Minn. Stat. § 237.06 requires every telephone company to provide fair and reasonable rates, tolls, and charges for its service and facilities for the accommodation of the public. All unreasonable rates, tolls, and charges are declared unlawful.

Centron services are classified as emergingly competitive under Minn. Stat. § 237.59, subd. 1. Under Minn. Stat. § 237.60, subd. 5, competitive services are subject to the complaint procedures of Minn. Stat. § 237.081. The subdivision further states:

> In a complaint proceeding, the company providing the service bears the burden of proving that the prices charged cover its incremental costs and a reasonable contribution to the common and joint costs of the company and are fair, just, and reasonable.

III. COMMENTS OF THE PARTIES

A. McLeod

McLeod argued that chip-in is not a separate or new service that warrants a separate charge. McLeod noted that chip-in is part of the standard conversion process when customers switch to resold Centrex service in other states.[1] In Iowa, US WEST converts an end user to resold Centrex for a $25 service charge plus $25 per line, with no separate charge for a chip-in functionality. By contrast, US WEST charges an installation fee of $83 plus $18 per line for conversion to Centron, and now wishes to charge an additional $80 per order for chip-in. McLeod argued that the costs should be comparable, since US WEST's Minneapolis office handles conversions to resold Centrex/Centron for both Minnesota and Iowa.

McLeod also noted that US WEST does not charge a separate chip-in charge when a customer converts to Centron 50 or Centrex 21, US WEST's two service offerings which are most comparable to a reseller's use of Centron to serve small business customers.

McLeod argued that US WEST is attempting to double recover through its cost study supporting the chip-in functionality. McLeod stated that many of the cost items, such as "service and billing costs," are for activities that are much broader than the data entry function necessary to chip-in the existing number. McLeod argued that those activities are distinct from chip-in and are presumably already captured in other cost studies supporting separate functions.

McLeod alleged that US WEST failed to properly support costs in its proposed chip-in tariff. McLeod asked the Commission to reject the tariff, and require US WEST to use the order process it currently uses for conversion to Centron 50 or Centrex, for which no separate chip-in fee is charged.

[1] Centron is known as Centrex in the other states in which US WEST offers the service.

B. Frontier

Frontier argued that the chip-in cost study is based on functions unrelated to the chip-in service and thus fails to support the proposed chip-in charge. Frontier analyzed the cost elements and argued that most were related to the establishment of Centron accounts, the removal of the previous telephone number, or closing out customer accounts--all functions which US WEST might perform in many other contexts. Frontier argued that the only cost element directly related to chip-in was the process of adding the number to the Centron common block. Frontier stated that this simple data entry element was grossly exaggerated as to time and cost. Frontier concluded that the costs in the chip-in supporting data were inflated and duplicative of costs related to separate functions.

C. The Department

The Department argued that US WEST failed to meet its burden of proving the proposed chip-in rate reasonable. The Department stated that the cost information provided was insufficient to confirm that the cost study elements are unique to the chip-in function, or that the study does not include cost elements already recovered through other previously approved rates.

The Department noted that US WEST has offered chip-in in Iowa, without charge, for at least four years. The Department also noted that US WEST's Centrex 21 customers are currently receiving the chip-in functionality in Minnesota without any cost beyond the installation charge.

The Department recommended that the Commission approve the chip-in tariff, but disapprove the proposed rate.

D. US WEST

US WEST stated that it has met its obligation of providing cost studies to support the chip-in tariff. US WEST argued that McLeod's and the Department's allegations of cost study invalidity are unsupported by any factual data.

US WEST argued that chip-in must be evaluated without regard for the status, cost, or availability of that feature in other jurisdictions. The pricing and packaging of services within a product offering may vary significantly from jurisdiction to jurisdiction, rendering comparisons of features and pricing inappropriate.

US WEST noted that Minn. Stat. § 237.60, subd. 4 requires that prices or rates for competitive services cover the incremental costs of the service. According to US WEST, the Commission cannot approve the chip-in tariff without allowing US WEST to charge the costs proposed in its supporting cost study.

IV. COMMISSION ACTION

Minnesota statutes provide a streamlined regulatory process for emergingly competitive services. The statutes allow new services and prices to go into effect swiftly, with a minimum of regulatory review.

The streamlined statutory process nevertheless requires companies proposing emergingly competitive rates and plans to conform to certain requirements. Minn. Stat. § 237.60 requires the filing to include a long-run incremental cost study supporting the costs of providing the service. Minn. Stat. § 237.06 requires the rates, terms, and charges for the service to be fair and reasonable. Minn. Stat. § 237.60, subd. 3 prohibits telephone companies from offering telecommunications services upon terms or rates that are unreasonably discriminatory. When a complaint is filed regarding an emergingly competitive service, the company providing the service bears the burden of proving that it has complied with these statutory requirements.

In this complaint proceeding, US WEST has failed to meet its burden of proof. For a number of reasons, the Commission cannot find that the proposed chip-in rates are sufficiently supported by data or reasonable, and therefore cannot allow them to go into effect.

First, the commenting parties have raised significant issues regarding the validity of the chip-in charges. From the cost information provided by US WEST, it is difficult if not impossible to determine if the proposed chip-in charges are nondiscriminatory or if they properly cover the incremental costs of providing the service. Beyond the level of cost, the question extends to applicability of the cost data. McLeod, Frontier, and the Department have raised significant questions as to whether the chip-in costs are covered elsewhere, in other cost studies for other functionalities. US WEST has failed to satisfy these questions raised.

Second, the fact that US WEST offers chip-in without charge in other jurisdictions (although not dispositive in and of itself) puts US WEST to its proof regarding the legitimacy of the chip-in costs in the Minnesota tariff. US WEST has failed to explain the rationale for the disparate treatment in various jurisdictions.

Third, the fact that US WEST does not levy a separate chip-in charge for Centron 50 and Centrex 21 (US WEST's own offerings which are analogous to resellers' use of Centron) puts the burden on US WEST to explain the difference. At the March 10 meeting, US WEST for the first time stated that the company doesn't charge chip-in costs for Centron 50 and Centrex 21 because its customers using these products already have shared common blocks and thus do not impose the same costs as customers being chipped-in to a Centron common block. If US WEST has data or cost studies to support this explanation, it should produce the information.

For all these reasons, US WEST has failed to meet its burden of proof to answer the allegations raised in this complaint proceeding. Until such time, if any, that US WEST submits a chip-in cost study and supporting data that refute the allegations raised, the Commission will not allow the proposed chip-in rates to remain in effect. The Commission will, however, approve the underlying chip-in feature, which is a demonstrable improvement over ACT and should be allowed to go into effect.

Finally, the Commission notes that Centron resellers have been paying US WEST's proposed chip-in charge since August 8, 1997, when US WEST began implementing the tariff, pending requested Commission approval. The Commission has now found that the proposed rate is insufficiently supported by factual data and cannot be found reasonable. The Commission will therefore order US WEST to refund to any Centron reseller customer any amount paid for a separate chip-in charge under the proposed tariff.

ORDER

1. The Commission approves US WEST's tariffed chip-in service while rejecting US WEST's proposed charge for said service.

2. Within 60 days of the date of this Order, US WEST shall refund to Centron resellers any amounts paid for separate chip-in charges since US WEST's implementation of its chip-in tariff.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (612) 297-4596 (voice), (612) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of a Formal Complaint by McLeod Telemanagement, Inc. against US WEST Communications, Inc. Regarding the Sale of Centron/Centrex Services

ISSUE DATE: June 11, 1998

DOCKET NO. P-421/C-96-968

ORDER AFTER RECONSIDERATION

PROCEDURAL HISTORY

On August 20, 1996, McLeod Telemanagement, Inc., now known as McLeodUSA Telecommunications Services, Inc. (McLeod), filed a complaint against US WEST Communications, Inc. (US WEST). McLeod alleged that US WEST was imposing discriminatory and anti-competitive terms on McLeod's purchase and resale of Centron services.

On July 10, 1997, the Commission issued its ORDER REQUIRING TARIFF FILINGS. In that Order the Commission required US WEST to file a tariff offering a "chip-in" function. This feature would allow new customers to retain their telephone numbers as they enter preexisting Centron common blocks. US WEST filed its chip-in tariff on July 29, 1997; the chip-in rates went into effect on August 8, 1997.

On April 1, 1998, the Commission issued its ORDER APPROVING TARIFF WITH MODIFICATION AND REQUIRING REFUND. In that Order the Commission found that US WEST had failed to show that its chip-in rates are sufficiently supported by data or that they are reasonable. The Commission approved the proposed chip-in offering, which was a demonstrable improvement in technology, but refused to allow the proposed chip-in rates to remain in effect. The Commission further required US WEST to refund any Centron reseller customer any amount paid for a separate chip-in charge under the proposed tariff.

108

On April 13, 1998, US WEST filed a request for reconsideration and a supplementary cost study. US WEST's new cost study showed a per/number chip-in charge of approximately $16.00 in place of the former per/order charge of $80.00.[1] US WEST stated that it had recently given an on-site demonstration of chip-in processing to two staffpersons from the Department of Public Service. US WEST expressed its hope that the site visit and new cost study would resolve the Department's doubts and persuade the agency to recommend approval of the chip-in rate.

US WEST stated that the Commission should approve the Company's proposed chip-in rates because the new cost study fairly reflects the costs of chip-in. US WEST argued that the Commission's analysis of US WEST's chip-in pricing policies in other jurisdictions (in which chip-in is offered without separate charge) is irrelevant to consideration of the proposed rate in Minnesota. US WEST argued that the Commission may not order US WEST to refund the money it has collected for chip-in services, because the Commission lacks the authority to order refunds under Minn. Stat § 237.60(2)(f).

On April 23, 1998, McLeod, Frontier, and the Department filed reply comments. McLeod argued that the Commission should not consider US WEST's new cost study because an aggrieved party's submission of new evidence during reconsideration proceedings is contrary to Minn. Rules, part 7829.3000. Even if the cost study were considered, it does not prove that the chip-in costs are not covered elsewhere, in other cost studies for other functionalities. McLeod argued that the Commission properly considered US WEST's charges for identical functionalities in other states and in other, analogous services often used by US WEST in competition with resellers.

Frontier argued that US WEST's cost study was inappropriately filed upon reconsideration and failed to justify the charges proposed. Frontier also argued that the Commission has implied authority to require refunds under Minn. Stat. § 237.081.

The Department stated that US WEST has failed, either through its cost studies or through its on-site demonstration, to show the cost and functionality differences between a regular Centron reseller order processing and a reseller order processing requiring chip-in. The Department stated that it is still unable to determine if the Company's chip-in charges are adequately supported by the cost studies, or whether the rates may include functions associated with such common costs of Centron processing as directory paperwork or account reconciliation. The Department recommended that the Commission deny the request for reconsideration and order refunds of chip-in charges collected after the Commission's April 1, 1998 Order.

On May 4, 1998, US WEST filed additional information on its cost study.

On May 26, 1998, the matter came before the Commission for consideration.

---

[1] Because US WEST states that the average number of lines per order is five, the per/line charge of $16.00 would correspond very closely to the former per/order charge of $80.00.

FINDINGS AND CONCLUSIONS

US WEST has filed a new cost study in an attempt to support a nonrecurring charge of approximately $16.00 per line for the chip-in functionality. The chip-in charge is in addition to the $80 Centron initiation fee and the $18 nonrecurring charge for each additional line.

Setting aside the issue of the timeliness of US WEST's filing, the Commission finds that the information presented, like the information presented in US WEST's previous cost studies, fails to support the proposed rates.

In its April 1, 1998 Order, the Commission made US WEST's burden of proof abundantly clear: show, definitively, that the proposed rates are reasonable and nondiscriminatory. In this case specifically, show that the level of the charge is justified, and that the costs shown are not covered elsewhere, in other cost studies for other functionalities. US WEST has failed to meet this burden of proof, as it is required to do under the complaint statute, Minn. Stat. § 237.081.

After carefully analyzing the Company's filings and observing Centron processing on-site, the Department concluded that the data presented does not allow the essential comparison: the costs associated with a Centron order processing *with* the chip-in feature versus a Centron order processing *without* the chip-in feature. This comparison, after all, should be the essence of the documentation supporting a separate charge for the chip-in feature. The comparison should not be beyond the capabilities of the company that implements the Centron order processing. Yet, US WEST has failed to provide the data necessary for the Department to determine these comparative costs. US WEST's data also fails to show that the functionality is not included in other filed cost studies. US WEST has failed to meet its burden of proving that its chip-in rates are factually supported, fair, just, reasonable, and nondiscriminatory.
Minn. Stat. §§ 237.60, subds. 3 and 5; 237.081; 237.06.

US WEST argues that logic supports *some* cost for providing chip-in. While this is true, the fact does not free the Commission to approve rates unsupported by documentation. US WEST argues that the Commission cannot derive costs solely through comparisons with charges in other jurisdictions or for analogous services. The Commission has not held otherwise. The Commission has, however, used these comparisons in its overall analysis of US WEST's rate proposals. The comparisons have provided one piece of the Commission's finding that the proposed rates cannot be found reasonable.

For these reasons, the Commission will deny US WEST's request to reconsider the rejection of proposed rates for the chip-in function.

Finally, the Commission continues to find, upon reconsideration, that US WEST must refund the chip-in charges it has collected to date. In a complaint proceeding under Minn. Stat. § 237.081, the Commission has found that US WEST's proposed rates are insufficiently supported by factual data and cannot be found reasonable. In a January 2, 1998 decision,[2] the Minnesota Court of Appeals found that the Commission has implied authority under Minn. Stat. § 237.081 to order a refund. The Commission has acted within its authority and properly found that a refund of all charges is warranted in this case.

The Commission will deny US WEST's request for reconsideration.

ORDER

1. The Commission denies US WEST's request for reconsideration.

2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (612) 297-4596 (voice), (612) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

[2] In the Matter of a Formal Complaint of the Members of the MIPA Against US WEST Communications, Inc., Minnesota Court of Appeals Docket No. CO-97-606.

111

APPENDIX G

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. against US WEST Communications, Inc. Regarding Access Service

ISSUE DATE: August 12, 1998

DOCKET NO. P-421/C-97-238

ORDER ALLOWING WITHDRAWAL OF COMPLAINT

PROCEDURAL HISTORY

On February 14, 1997, AT&T Communications of the Midwest, Inc. (AT&T) filed a complaint against US WEST Communications, Inc. (US WEST). AT&T alleged that US WEST had provided an inadequate and inconsistent quality of dedicated access service, thus hindering AT&T's ability to provide high quality interexchange services to Minnesota end-users.

On June 6, 1997, the Commission issued its ORDER DENYING REQUEST TO DISMISS COMPLAINT, FINDING JURISDICTION, AND SETTING COMMENT PERIOD. In that Order the Commission denied US WEST's motion to dismiss AT&T's complaint, determined that it has jurisdiction over the issues raised in the complaint, and found that there were reasonable grounds to investigate the allegations raised.

On January 20, 1998, AT&T submitted a letter to the Commission stating that US WEST and AT&T had resolved the issues raised in the complaint and that AT&T was withdrawing its complaint. AT&T requested the Commission to close the docket.

On August 4, 1998, the matter came before the Commission for consideration.

FINDINGS AND CONCLUSIONS

The parties have resolved the competitive issues raised in AT&T's complaint against US WEST. AT&T no longer wishes to pursue the claims and has asked the Commission for permission to withdraw its complaint. The parties agree that the docket should be closed.

112

The Commission will comply with the parties' request, allow AT&T to withdraw its complaint, and close the docket.

ORDER

1. The Commission grants AT&T's request to withdraw its February 14, 1997 complaint against US WEST.

2. The docket is closed.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

APPENDIX H

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of a Complaint of MCImetro Access Transmission Services, Inc. Against U S West Communications, Inc. for Anticompetitive Conduct

ISSUE DATE: July 29, 1998

DOCKET NO. P-421/C-97-1348

ORDER FINDING BREACHES OF STATE LAW AND INTERCONNECTION AGREEMENT AND REQUIRING COMPLIANCE, NEGOTIATIONS AND FILINGS

PROCEDURAL HISTORY

On September 4, 1997, MCIm Access Transmission Systems Services, Inc. (MCIm) filed a complaint against U S West Communications, Inc. (USWC) for anticompetitive conduct. In its complaint, MCIm alleged that USWC failed to provide adequate facilities for local service, as required by state and federal law. In addition, MCIm alleged that USWC has engaged in a pattern and practice of anticompetitive conduct and that such conduct has created a barrier to MCIm's entry into the local market and has hindered MCIm in its ability to provide local telecommunications services to new customers and to provide high quality service to existing customers.

On September 16, 1997, the Commission issued a notice soliciting comments on the following three questions: 1) whether the Commission has jurisdiction over this matter; 2) whether there are reasonable grounds to investigate all allegations; and 3) whether the Commission should treat this matter as a complaint under Minn. Rule part 7829.1700, or an arbitration under Minn. Rule part 7812.1700. The notice provided parties 10 days to respond.

On September 26, 1997, MCIm, USWC, the Minnesota Department of Public Service (the Department), and the Residential and Small Business Utility Division of the Office of the Attorney General (RUD-OAG) filed comments.

On November 4, 1997, the Commission issued its ORDER FINDING JURISDICTION AND INITIATING EXPEDITED PROCEEDING. In its Order, the Commission found 1) that it has jurisdiction over the issues of the Complaint, 2) that there are reasonable grounds to investigate the Complaint, and 3) that the appropriate mechanism for resolving this Complaint was Part A, Section 11 of the MCIm/USWC Interconnection Agreement.

On November 14, 1997, USWC filed its Answer to the Complaint and Motion to Strike.

114

On November 24, 1997, MCIm filed its initial comments, affidavits, and opposition to USWC's Motion to Strike. USWC filed its initial comments and affidavits the same day.

On December 15, 1997, MCIm and USWC both filed rebuttal comments and affidavits.

On January 20, 1998, MCIm, USWC, and the Department filed final comments

On March 18 and 19, a two-day evidentiary hearing was held before Commissioner Scott. During this hearing the parties' witnesses were examined by Commissioner Scott, the Commission's Counsel, and Commission Staff.

On April 17, 1998, the Department, MCIm and USWC filed final comments and recommendations.

The Commission met on June 17, 1998 to consider this matter.

FINDINGS AND CONCLUSIONS

I. PRELIMINARY EVIDENTIARY CLARIFICATION

The Commission wishes to clarify the significance it has attached, while deliberating this matter, to complaints filed by MCIm against USWC in other jurisdictions, as alluded to by MCIm in its Complaint. The general rule is that the Commission may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable persons in the conduct of their affairs. Minn. Stat. § 14.60, subd. 1. Applying this rule, the Commission found that the items in question do not shed light on the merits of the specific issues before the Commission in this Order and, therefore, gave them no probative value.

Paragraph 32 of MCIm's complaint reports that MCIm has filed complaints against USWC in several jurisdictions alleging USWC's failure to meet its obligation under interconnection agreements and failure to cooperate in the development of local competition. The paragraph also notes that the Iowa Utilities Board found USWC to be in knowing and deliberate violation of the Board's orders relating to the schedule for implementation of the interconnection agreement. MCIm alleged that these actions support its assertion that USWC has engaged in a pattern and practice "in Minnesota and in other states," efforts to delay the development of competition in USWC's territory.

In developing its case against USWC in this matter, however, MCIm did not flesh out this broadly asserted allegation with any facts or analysis. The documents referred to in its Complaint (four complaints and the order of the Iowa Utilities Board) were left to speak for themselves. The Commission concludes that, of themselves, these items do not shed light on the merits of the issues before the Commission in this Order.

- Regarding the order of the Iowa Utilities Board, the record developed by MCIm in this matter does not even demonstrate the comparability of the issues in this complaint and the Iowa matter, let alone provide evidence causally linking whatever the Iowa Board found occurred in Iowa with what occurred in Minnesota. As noted later in this Order, the record produced in this matter does not support a finding that USWC employees worked pursuant to some centrally controlled discriminatory plan intended to prejudice MCIm's competitive operations in Minnesota, let alone that they worked pursuant to an even more widespread centrally controlled plan affecting Iowa as well. Consequently, the findings of the Iowa Utilities Board have no probative value for this proceeding; that is, they do not tend to prove anything that the Commission needs to decide in this matter.

- As for the complaints filed by MCIm in the other jurisdictions (Arizona, Utah, Washington, and Colorado), the record contains nothing to demonstrate their merit or, more fundamentally, that the underlying circumstances of the complaints were similar to those in this case. The only thing that can be concluded from the existence of these complaints is that MCIm has filed interconnection agreement-related complaints in several jurisdictions. As with the Iowa Utilities Board's order, then, this evidence is not probative of any contested issue in this case.

Accordingly, in making its following determinations, the Commission has not given any weight to these items.

II. INTRODUCTION

In this Order, the Commission addresses MCIm's charges against USWC contained in a complaint filed September 4, 1997. MCIm alleged violations in fours main areas:

(a) Network Capacity and Forecasting
(b) Provisioning Intervals and Delivery of Facilities
(c) Test Orders
(d) Interim Number Portability

III. SUMMARY

In each of the four areas, the Commission finds that USWC has fallen short of compliance with the interconnection agreement in at least two instances. In one specific area (Delivery of Facilities), the Commission also finds that USWC's action (failure to meet its installation date commitments on a reasonably regular basis) violates a state statute that requires telephone companies to provide "reasonably adequate service". In no instance, however, has the Commission found that USWC intentionally violated the interconnection agreement or discriminated against MCIm in violation of state law.

In declining to make findings of intentional and discriminatory conduct on USWC's part, the Commission notes the first-time nature of the relationships and interactions created by the interconnection agreement and that the record reflects a difficult and complicated transition period in the telecommunications industry. During this initial phase of the transition, mistakes were made and USWC showed less than appropriate flexibility and cooperation to facilitate MCIm's entrance than MCIm had a right to expect under the interconnection agreement.

However, at this point the Commission gives USWC the benefit of the doubt and does not view USWC's actions as intentional and discriminatory. Instead, this Order notes where and how USWC has fallen below the appropriate standard and looks forward to improved performance. It is quite possible that if this kind of action (inaction) persists despite this corrective/clarifying Order it could be found to be intentional and discriminatory.

Finally, the Commission notes that there is room for operational improvements on both sides. Both companies will need to develop more cooperative (mutual problem-solving) modes of interaction. This Order hopefully moves the companies in that direction.

IV. FINDINGS

Based on the record of the proceedings and the arguments of counsel, the Commission makes the following findings.

A. Network Capacity and Forecasting

1. Tardy Provision of Network Forecasts: Sections 3.1 and 3.2 of the Interim Agreement

The companies' interim interconnection agreement became effective November 6, 1996[1] and remained in effect until the final interconnection agreement was approved in the Commission's March 17, 1997 Order.

MCIm alleged and the Commission finds that USWC breached provisions of Section 3 of the interim agreement by failing to provide MCIm with network forecasts. The record shows that USWC did not provide MCIm with a traffic forecast until January 1998, more than a year after the Interim Interconnection went into effect, despite its obligation under Section 3 of the interim agreement to provide 1) a one year forecast immediately upon execution of the agreement, 2) a two-year forecast six months after the effective date of this agreement, and 3) quarterly updates of these reports for all trunk routes, including end-office traffic forecasts.

2. Failure to Provide Notice of Major Network Projects: Interim Agreement (Section 3.4) and Final Interconnection Agreement (Attachment 3, Appendix A, Section 4.1.2.2)

Both the Interim Agreement and the Final Interconnection Agreement obligate USWC and MCIm to notify each other of "major network projects," i.e. developments that could affect the other party or significantly increase or decrease trunking demand for the next forecasting period. The Commission finds that USWC breached its obligation in this regard when it did not inform MCIm about the exhaust of the USWC local tandem in a timely manner. Although it knew about the exhaust, USWC did not inform MCIm about this situation until MCIm ordered tandem trunks for interconnection in March 1997.

USWC further breached this provision by failing to provide MCIm with a timely report that its (USWC's) work on permanent number portability (PNP) would effectively suspend work on interconnecting MCIm facilities into a switch. While the entire industry knew that PNP was

---

[1] On November 6, 1996, the Commission issued an ORDER approving an interim interconnection agreement between MCIm and USWC. In its Order, the Commission exercised its statutory authority to determine an appropriate interim interconnection arrangement between the companies, pending adoption of the Commission's local competition rules.

being implemented, MCIm couldn't be expected to know that USWC would suspend all work on MCIm requests for interconnection while PNP was being installed, in the absence of USWC's timely report as required under MCIm interim and final interconnection agreement.

3. Alleged Intentional and Discriminatory Breaches

MCIm asserted that USWC's breaches of the interconnection agreement (found above in sections 1 and 2) were intentional and discriminatory. The Commission finds that the noted breaches resulted from conscious decisions on the part of USWC, in the sense that USWC officials were aware that they were not providing the network forecasts and reports. However, there is inadequate record to substantiate a discriminatory or anticompetitive animus on the part of USWC in this regard.

4. Alleged Failure to Treat MCIm Fairly, Equally, and in a Non-discriminatory Manner

MCIm argued that the USWC's actions (found above) breached its obligations under Attachment 3, Appendix A, Section 7.1 of the Interconnection Agreement to treat it "fairly, equally, and in a non-discriminatory manner." The Commission agrees that USWC's actions (found above) violate this provision of the companies' agreement. The provision does not require the Commission to find that USWC had an **intention** to treat MCIm unfairly, unequally, or in discriminatory manner before a breach may be found. The provision is breached if, as an objective matter, MCIm is treated unfairly, unequally, etc. regardless of USWC's intent.

In this case, the Commission has found that USWC did not provide MCIm with certain forecasts and reports required under the agreement. Since MCIm had bargained to receive this information, USWC's non-provision of this information was unfair, regardless of what USWC's intent may have been. Further, to the extent that USWC treated MCIm differently than it treated itself with respect to the information at issue (i.e. the forecasts and the information that should have been transmitted in the reports) USWC treated MCIm unequally and discriminated (vis a vis itself) against MCIm, within the meaning of the cited section of the agreement.

5. Alleged Barrier to Entry

MCIm charged that USWC's breaches (found above) constituted a barrier to the Company's entry into the local market in violation of the Telecommunications Act of 1996. The Commission finds that the breaches slowed that entry but certainly did not prevent it. Finally, USWC's challenged actions (inactions) breached the interconnection agreement (as found above), but did not thereby automatically violate the Telecommunications Act of 1996 as asserted by MCIm.

6. Breaches in Violation of Minn. Stat. § 237.121 (4): Refused

Minn. Stat. § 237.121 states:

> A telephone company or telecommunications carrier may not do any of the following with respect to services regulated by the commission:

118

. . . . .

(3) **fail** to provide a service, product, or facility to a telephone company or telecommunications carrier in accordance with its . . . contracts and with the commission's rules and orders.

(4) **refuse** to provide a service, product, or facility to a telephone company or telecommunications carrier in accordance with its . . . contracts and with the commission's rules and orders.

The record shows that USWC could have provided the forecasts and reports of major network projects, as required by the interconnection agreement (contract), and consciously decided not to provide these items. In this sense, the Commission finds that USWC did not merely **fail** to provide the items in violation of Minn. Stat. § 237.121 (3), but did in fact **refuse** to provide them, in violation of Minn. Stat. § 237.121 (4), as alleged by MCIm.

7. Moving Forward

MCIm requested that the Commission direct USWC to 1) comply with all network forecast and major project reporting requirements and 2) immediately deploy the facilities that have been forecast by MCIm and insure that they will be available in the period forecast by MCIm. In light of the record established in this matter, these appear to be reasonable steps and the Commission will so order.

The first request requires little discussion. USWC's obligation under the agreement is clear. With the Commission's further emphasis and encouragement in this Order it is anticipated that this obligation will be promptly and consistently honored by USWC in the future.

The second request involves discussion of the timing and accuracy of MCIm's forecasts and USWC's past behavior regarding those forecasts, the alleged disregard of MCIm's July 1996 forecast and insufficient consideration of MCIm's November 1996 forecasts:

- The Commission finds that USWC did not factor in MCIm's first forecast (July 1996) because, at that time, USWC had no established process for taking CLEC forecasts into account. While this failure on USWC's part is unbecoming and will not be accepted in the future, examination of the relevant witnesses and review of the record reveals that USWC's inaction regarding the July 1996 forecast was the initial response (i.e. none) of an entrenched system unable to respond to new requirements rather than the result of a design on the part of USWC to thwart a competitor's capacity to serve its customers. The record certainly contains no showing of wrongful intent on the part of any USWC employee.

- The record indicates that USWC did take MCIm's November 1996 forecast into account but was unable to avoid exhaust and meet MCIm's orders for interconnection in March 1997 due to two factors which have been acknowledged by both MCIm and USWC: 1) when USWC is unable to meet the projected need (e.g. MCIm's November 1996 forecast) out of current capacity, it takes USWC seven months to provide the additional facilities and 2) sudden expansion in use of Internet related services, unanticipated by either MCIm or USWC, propelled an extraordinary increase in demand.

B. Provisioning Intervals and Delivery of Facilities

1. Provisioning Interval Problem: Failure to Provide FOCs for LIS Trunks in a Timely Manner Breaches the Interconnection Agreement

Attachment 3, Appendix A, Section 4.3.3 of the companies' interconnection agreement states in relevant part:

> The interval used for the provisioning of Local Interconnection Trunk Groups shall be no longer than the standard interval for the provisioning of USWC's Switched Access service and shall be consistent with USWC's actual provisioning intervals for its own Switched Access customers.

MCIm stated that USWC breached its obligations under this section by failing to provide Firm Order Confirmations (FOCs)[2] for each order to MCIm within 24 hours of receipt of a simple order and eight business days for complex orders.

The Commission finds that USWC has breached the cited section. While the cited section is not a model of clarity (no specific time intervals for FOCs are stated), it is indisputable that the parties attached some importance to timely provision of FOCs. The Commission finds that this section stands for that mutual intention and, further, that USWC's performance regarding FOCs violated the expectation of reasonable timeliness that this section represents.

USWC's defense that all MCIm orders are complex (and, therefore, that a longer period to provide the FOC should be applied) is unavailing. USWC's own filings (reflecting USWC's own classification of orders as "simple" or "complex") show that USWC's performance measured in the light of its own evidence repeatedly fails to meet the contractual standard, reasonable timeliness. The evidence shows that USWC has never provided an FOC within two business days for any MCIm local interconnection order and that the average period it took USWC to provide an FOC was 35 business days. In these circumstances, USWC's performance clearly violated the companies' agreement (mutual expectation of reasonable timeliness) regarding provision of FOCs.

The Agreement states the time for providing a FOC for LIS trunks to MCIm in terms of the standard interval for Switched Access Service. The fact that it turns out that USWC's **Service Interval Guide** does not list a standard interval for Switched Access Service does not get USWC off the hook. USWC cannot claim that there is no standard interval for providing FOCs for LIS Trunks (and therefore that its performance cannot be found unsatisfactory) just because it turns out that its **Service Interval Guide** doesn't set one for Switched Access Service. Section 4.3.3 clearly has **some** meaning, i.e. to establish some provisioning interval requirement applicable to LIS Trunks. In the absence of a specific written standard interval for LIS trunks, the Commission concludes that the parties would intend a reasonable interval to apply.

The record shows that USWC uses a 2-day interval for issuing FOCs when provisioning local interconnection trunks where facilities are in place. The Commission finds that USWC's

---

[2] A Firm Order Confirmation (FOC) is a document acknowledging receipt of the order, summarizing the order, and providing the date upon which USWC commits to delivering the specified service.

de facto established interval provides a reasonable standard by which USWC's performance with respect to provisioning LIS trunks can be measured. In that light, USWC's performance (35 days, on average, to provide an FOC) clearly breached the companies' agreement.

2. Delivery of Facilities Problem: Failure to Install LIS Trunks on the FOC's Target Date Violates Inadequate Service Requirement of Minn. Stat. § 237.06

The record shows that USWC has regularly failed to deliver local interconnection trunking on the dates it promised MCIm in its FOCs. USWC admitted a failure-to-deliver rate of 30% for local interconnection trunking. Failure to meet delivery date commitments is a serious matter, causing substantial inconvenience to MCIm customers and needless disruption and embarrassment to MCIm. USWC has not provided any reasonable explanation for such a failure rate. When ordered facilities are not in place and have to be constructed, it is understandable and expected that the provisioning (installation) period will be longer. However, this should not result in missed installation dates. USWC should be able to provide installation on the dates to which it commits.

Minn. Stat. § 237.06 states in part:

> It shall be the duty of every telephone company to furnish reasonably adequate service and facilities for accommodation of the public, ...

The Commission finds that USWC has failed to provide MCIm "reasonably adequate service" within the meaning of the statute with respect to meeting its installation commitments.

3. Breach of Agreement Requirement to Treat MCIm Fairly, Equally and in a Nondiscriminatory Manner

The companies' interconnection agreement provides in part:

> USWC and MCIm agree to treat each other fairly, equally, and in a nondiscriminatory manner for all items included in this Agreement or related to support of items included in this Agreement.

Agreement, Attachment 3, Appendix A, Section 7.1

As noted above, USWC has regularly provided FOCs late (i.e. beyond the time indicated in the interconnection agreement) and has missed an inordinate number of committed installation dates. The Commission finds that in so doing, USWC has treated MCIm unfairly, unequally, and in a discriminatory manner in violation of the cited section of companies' Agreement.

The Commission clarifies (consistent with the discussion above regarding USWC's breach of this section with reference to network forecasts and reports of major network projects) that Section 7.1 does not require the Commission to find that USWC had an **intention** to treat MCIm unfairly, unequally, or in a discriminatory manner before a breach may be found. The provision is breached if, as an objective matter, MCIm is treated unfairly, unequally, etc. regardless of USWC's intent.

In this case, the Commission has found that USWC 1) did not provide FOCs in a timely manner and 2) very often (too often) failed to keep installation date commitments. The Commission finds that USWC's treatment of MCIm in this regard was "unfair," as that term appears in the cited section of the agreement. Further, to the extent that USWC treated MCIm differently than it treated itself with respect to these items (provision of FOCs and keeping installation date commitments) USWC treated MCIm unequally and discriminated (vis a vis itself) against MCIm, within the meaning of the cited section.

4. Moving Forward

MCIm and the Department have suggested several steps the Commission could take to promote compliance with the interconnection agreement. The Commission will accept several of these suggestions and reject several, discussed as follows.

The Commission will accept MCIm's suggestion that USWC be ordered to deliver all interconnection facilities within the prescribed time limits of the agreement or its tariff. In light of this record, a reminder to USWC of the importance of meeting time limits and commitments seems appropriate. The Commission will not, however, commence a compliance or other proceeding for the purpose of determining any performance credits due to MCIm due based on USWC's alleged failure to meet Direct Measures of Quality (DMOQs). The Commission believes that this would unnecessarily expand the scope and purpose of this proceeding. If MCIm believes that certain DMOQs apply, it can bring those issue forward in a separate proceeding.

The Commission also finds reasonable and will accept the Department's following suggestions:

- USWC should provide a monthly report to the Commission for a period of one year which shows the time lines of the installation of LIS trunk services and trunk services used to connect MCI's customers to its network.
- USWC should provide service guarantees for service installations that are provided late; the parties should negotiate these guarantees and provide proposals to the Commission within 60 days of the Order in this case
- USWC should provide a monthly report on the conformance to the FOC standards for a period of one year and provide service guarantees for FOCs that are provided late. The parties should negotiate these guarantees and provide proposals to the Commission within 60 days of this Order.

C. Provision of Combinations of Unbundled Network Elements (UNEs) for Testing Purposes

In August 1997, MCIm placed several orders to USWC for a combination of unbundled network elements (UNEs). USWC has refused to fill these orders, in part on the grounds that MCIm's tariff does not authorize it to offer service using UNEs. USWC's argument is inapplicable in this situation, however, because MCIm intends to use the requested recombined UNEs solely for the purpose of testing the operation and efficiency of the recombined UNEs, not to provide service to its (MCIm's) customers.[3] Such testing, MCIm has asserted, was specifically envisioned by the companies when they forged their interconnection agreement and the agreement specifically requires USWC to cooperate with MCIm regarding this testing. See Interconnection Agreement, Attachment 3, Section 14.1.

USWC has further argued, however, that providing MCIm with recombined UNEs (even for the limited purpose of testing) is inconsistent with the 8th Circuit Court of Appeals decision regarding the provision of unbundled elements. The Commission has already addressed this argument. In its February 23, 1998 ORDER DENYING RECONSIDERATION in this matter, the Commission stated on pages 2-3:

> USWC's basic objection is to decisions that the Commission made many months ago in the Consolidated Arbitration Proceeding[4] regarding the unbundling issue. It is now untimely to revisit that question. The Company may not avoid the untimeliness of its challenge by bootstrapping it to the November 4, 1997 Order.[5]
>
> USWC has alleged that MCIm has "no legal basis upon which to continue enforcement of the provisions of the interconnection Agreement that require USWC to provide combinations of network elements or superior service." The heart of USWC's argument is that the Eighth Circuit Court of Appeals decision that certain FCC rules are illegal[6] automatically renders the unbundling

---

[3] Since MCIm has clarified that it did **not** intend to use the requested UNEs to provide service to its customers, the Commission does not need to address the hypothetical question whether USWC would have had the right to refuse to provide the requested recombined UNEs service based on its belief that MCIm was about to violate its (MCIm's) tariff by providing service to customers using the recombined UNEs.

[4] In the Matter of the Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, DOCKET NOS. P-442,421/M-96-855; P-5321,421/M-96-909; P-3167,421/M-96-729, ORDER RESOLVING ARBITRATION ISSUES AND INITIATING A US WEST COST PROCEEDING (December 2, 1996) and ORDER RESOLVING ISSUES AFTER RECONSIDERATION AND APPROVING CONTRACT (March 17, 1997).

[5] The Commission notes that its November 4, 1997 Order, which USWC requested the Commission to reconsider, does not address the unbundling provisions that USWC now asserts are "unlawful" due to the Eighth Circuit Court of Appeals decisions. In fact, at the hearing preceding the November 4, 1997 Order, USWC did not challenge Commission jurisdiction to hear MCIm's complaints regarding implementation of the unbundling provisions and simply questioned whether the Commission had jurisdiction over allegations that are independent of the provisions of the interconnection agreement. Order at page 2.

[6] See Iowa Utilities Board v. FCC, Orders dated July 18 and October 14, 1997).

provisions of the MCIm/USWC Interconnection Agreement void or at least unenforceable.

> However, it is not clear that the Eighth Circuit decisions had that intent or effect. The unbundling provisions that USWC has asserted are void or unenforceable are located in an Interconnection Agreement that the Commission ordered between MCIm and USWC after an arbitration proceeding. See Orders cited in Footnote 1.
>
> The proximate cause of the unbundling provisions objected to by USWC, therefore, are Orders of this Commission and the contractual arrangement (Interconnection Agreement) between USWC and MCIm, not the FCC provisions struck down by the Court. Until those Orders of the Commission are amended to require alteration of the USWC/MCIm Interconnection Agreement, MCIm does have a legal basis upon to seek enforcement of those provisions.

Moreover, as the Commission further noted, the 8th Circuit Court of Appeals did not address itself to the validity of any existing Interconnection Agreements. The Commission stated:

> The Court did not even direct the party commissions to review commission-approved Interconnection Agreements for consistency with the Court's orders and revise them accordingly.[7] Hence, it does not appear that the Court intended its orders to impact the already-made decisions of state commissions or to alter the substantive terms of existing Interconnection Agreements.
>
> ORDER AFTER RECONSIDERATION at page 4.

Consistent with that reasoning, the Commission restates in this Order that the Commission's Order in the Consolidated Arbitration Proceeding[8] appears unaffected by the 8th Circuit Court's decision and therefore remains in effect.

To review: the Commission's Order in the Consolidated Arbitration Proceeding approved an interconnection agreement which, via its testing provisions, requires USWC to provide combined unbundled network elements (UNEs) to MCIm and other CLECs. The testing

---

[7] For that matter, the Commission does not view the unbundling provisions as necessarily inconsistent with the invalidity of the FCC rules and certainly the Eighth Circuit Court of Appeals did not rule that the unbundling provisions were invalid. In short, invalidation of the FCC rules does not render the unbundling provisions contrary to law as USWC contended.

[8] In the Matter of the Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, DOCKET NOS. P-442,421/M-96-855; P-5321,421/M-96-909; P-3167,421/M-96-729, ORDER RESOLVING ARBITRATION ISSUES AND INITIATING A US WEST COST PROCEEDING (December 2, 1996) and ORDER RESOLVING ISSUES AFTER RECONSIDERATION AND APPROVING CONTRACT (March 17, 1997).

provisions place an affirmative duty upon USWC to provide the combined UNEs as requested by MCIm. Therefore, in refusing to do so, USWC's has violated the testing provisions of the MCIm/USWC interconnection agreement.

At the same time, the Commission will exercise appropriate caution and deference with respect to any applicable federal court authority. Therefore, in light of the U. S. Supreme Court's pending review and possible clarification of the 8th Circuit Court of Appeals decision in a manner that would clearly impact the validity of the Commission's Order and the interconnection agreement's testing provisions, the Commission will on its own motion stay any requirement that USWC perform said duty and will also stay any enforcement or compliance action until 60 days after the decision by the Supreme Court regarding the 8th Circuit's decision.

In the interim, the temporary stay will not prejudice MCIm's plans to test combined network elements.[9] For emphasis and clarification, the Commission will in this Order direct USWC to provide UNEs in a manner that allows MCIm to recombine these elements itself. Thereupon, MCIm will be able to test for functionality and efficiency as desired. The Commission further notes that MCIm could recoup from USWC any expense that MCIm may incur in the interim to combine these elements for testing, if the Commission later determines in light of the Supreme Court's decision on this matter that it is appropriate for MCIm to do so.

D. Interim Local Number Portability (ILNP) Related Problems Encountered in Connection With the Final Cutover to MCIm's System

Most Minnesota customers wishing to transfer their service from USWC to MCIm want to retain their original telephone number and are unwilling to make the switch if they will be cannot keep their original telephone number. Retention of the original local telephone number despite a transfer of provider requires what is referred to as the "portability" of the local number in question, "local number portability" or LNP. Pending development of permanent methods of achieving LNP, there are several interim methods used to achieve portability for the customer's local number.

The interim method favored by MCIm and all the other CLECs is Remote Call Forwarding (RCF). RCF involves two steps that must be completed within USWC's network. The first involves disconnecting the customer's number. The second step involves changing the route, i.e. forwarding calls sent to the old number to MCIm's switch.

Since the tasks necessary to complete these steps can only be done by USWC, new entrants to the local market such as MCIm are totally dependent on USWC's proper performance of these tasks for the prompt and seamless transfer of service. Failures at this point can be seriously

---

[9] To clarify, the bottom-line issue at hand is who should bear the cost of combining (recombining) unbundled network elements (UNEs). Under the interconnection agreement approved by the Commission and objected to by USWC, this cost is borne by USWC in the sense that, upon receipt of an order from MCIm for combined UNEs, USWC must provide them to MCIm in combined form for the sum of the prices for the elements in their unbundled state. USWC does not dispute that MCIm has the right to order uncombined (unbundled) elements and combine them itself.

detrimental to the reputation of the new entrant since they can result in interruptions of service that are conspicuous and highly vexing to customers.

Not surprisingly, the interconnection agreement specifically addressed this sensitive phase of the transfer of service from USWC to MCIm. Three provisions apply:

- Attachment 5, Section 3.4 states:

> USWC will provide MCIm with a Firm Order Confirmation (FOC) for each order within twenty-four (24) hours for a simple order or eight (8) business days for a complex order, of USWC's receipt of that order. The FOC must contain . . . USWC commitment date for order completion (Committed Due Date).

MCI has asserted that the information provided in an FOC would to allow it to coordinate with its customers to ensure a smooth transfer. Given the value of providing an FOC for the cutover date, the Commission is inclined to accept MCI's argument that Attachment 5, § 7.4.4 makes the FOC requirement contained in § 3.4 applicable to orders for ILNP. There is no reason to accept, as USWC argued, that the parties intended an FOC to be provided in connection with <u>permanent</u> number portability but not for interim number portability.

- Part A, Section 9.9 of the Agreement states:

> USWC warrants that it will provide MCIm, in a competitively neutral fashion, interim number portability . . . **with as little impairment** of functioning, quality, reliability and convenience **as possible**, ... (Emphasis added.)

- Attachment 9, Section 1.3.7 states:

> The Parties will develop and implement an efficient deployment process to ensure call routing integrity for toll and local calls, with the objective to **eliminate** customer downtime. (Emphasis added.)

Since ILNP involves disconnecting the customer's phone lines for an unspecified period of time, MCIm's policy has been to request implementation of ILNP during non-business hours so the customer's business operations are not unnecessarily disrupted. Prior to June 1997, USWC allowed MCIm to schedule cutovers for 2 a.m., a time convenient for many MCIm customers.

- In June 1997, without consulting with or negotiating with MCIm, USWC changed its policy and limited its cutovers to the hours between 7 a.m. and 6 p.m.
- When MCIm requested that USWC expand the evening hours to 9 p.m., USWC did not respond.
- When MCIm requested that USWC give it a price quote on after-hours staffing to do manned ILNP cutovers, the initiative was caught in a cross-fire of legal claims from both parties and went nowhere. According to MCIm, its request was simply motivated

by a desire to alleviate the large backlog of orders waiting FOC dates and, moreover, was not responded to within the 24 hour time frame established in the interconnection agreement. MCIm further stated that the price quote that USWC eventually provided was not cost-based as required by the agreement. USWC responded that MCIm had no right under the interconnection agreement to a 24-hour price quote and alleged that MCIm was simply searching to create a violation of the agreement. No arrangement addressing MCIm's installation problem was forthcoming.

USWC has conceded that problems with ILNP have been frequent, but blamed any delays on MCIm's failure to forecast and order sufficient trunking. USWC further stated that the changes it made in the hours it installed ILNP (performed the cutovers) was in response to the requests of other CLECs and was an effort to reduce customer downtime.

The Commission finds no evidence to support USWC's contention that the ILNP problems encountered by MCIm resulted from MCIm's failure to forecast and order sufficient trunking, as alleged by USWC. As to the changed hours for ILNP installation, the fact that some CLECs reportedly prefer this change does not remove USWC's obligations to MCIm (under the USWC/MCIm interconnection agreement) to work with MCI's particular circumstances and the specific needs of its customers to provide MCIm with ILNP with as little impairment of functioning, quality, reliability and convenience as possible (Part A, Section 9.9 of the Agreement) and to eliminate downtime (Attachment 9, Section 1.3.7).[10]

In reviewing this record, the Commission finds that USWC's efforts vis a vis MCIm in this regard have not met the standards set in the two cited provisions. The interconnection agreements approved by the Commission envision a company-specific approach (in this case an MCIm-specific approach) to impair functioning, convenience, etc., as little as possible and to eliminate down-time.

Accordingly, the Commission will direct USWC and MCIm to negotiate regarding the two suggestions MCIm has made to meet its ILNP needs and explore other appropriate means, keeping that clarification in mind:

- expansion of the hours USWC will implement ILNP from 5 a.m. to 9 p.m.; and
- provision of human intervention and assistance for cutovers beginning at 5 a.m.

The Commission believes that a more cooperative approach in this area is what is required by the agreement. This spirit of cooperation should also include a timely provision and compliance with FOCs for cutovers, as mentioned above.

[10] While USWC places emphasis on the word "objective", thereby arguing that a certain amount of downtime is assumed, the Commission clarifies that the goal clearly enunciated in this section is to "eliminate" downtime, not merely reduce it. Perhaps USWC's failure with respect to this provision may be traced to this subtle bit important misorientation to the task at hand, resulting in its insufficient flexibility and effort to respond to MCIm-specific conditions to eliminate downtime for MCIm.

ORDER

1. MCIm's proposal to include in the record MCIm's complaints against USWC in other jurisdictions and the Iowa Utilities Commission's order regarding MCIm's complaint against USWC in Iowa is rejected.

2. USWC shall comply with all network forecast and major project reporting requirements.

3. USWC shall immediately deploy the facilities that have been forecast by MCIm and insure that they will be available in the period forecast by MCIm.

4. USWC shall deliver all interconnection facilities within the prescribed time limits of the USWC/MCIm interconnection agreement.

5. Beginning 60 days from the date of this Order, USWC shall provide a monthly report on the conformance to the FOC standards for a period of one year.

6. USWC and MCIm shall negotiate guarantees for FOCs that are provided late and provide proposals to the Commission within 60 days of this Order.

7. On its own motion, the Commission hereby stays the requirement that USWC fill MCIm's "testing" orders for combined unbundled network elements (UNEs) until 60 days after the decision by the Supreme Court regarding the 8th Circuit Court of Appeals decision in Iowa Utilities Board v. FCC, 120 F.2d 753 (8th Cir. 1997).

8. Any enforcement or compliance action regarding the testing provisions of the MCIm/USWC interconnection agreement is likewise stayed until 60 days after the Supreme Court decision.

9. USWC shall provide UNEs in a manner that allows MCIm to recombine these elements itself.

10. The companies shall negotiate 1) the hours during which customers may have their service transferred (cut over) from USWC to MCIm and 2) the hours during which human assistance will be available to assist in the cutovers.

11. Within 60 days of this Order, the companies shall submit a proposal on the two items listed in Ordering Paragraph 10 or, in the event of their inability to agree on a proposal, submit their individual position papers;

12. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of a Complaint of MCImetro Access Transmission Services, Inc. (MCIm) against U S West Communications, Inc. (USWC) for Anticompetitive Conduct

ISSUE DATE: October 22, 1998

DOCKET NO. P-421/C-97-1348

ORDER AFTER RECONSIDERATION

PROCEDURAL HISTORY

On July 29, 1998, the Commission issued its ORDER FINDING BREACHES OF STATE LAW AND INTERCONNECTION AGREEMENT AND REQUIRING COMPLIANCE, NEGOTIATIONS AND FILINGS.

On August 10, 1998, US WEST Communications, Inc. (USWC) and MCImetro Access Transmission Systems Services, Inc. (MCIm) filed petitions for reconsideration of the Commission's Order.

On August 20, 1998, USWC, MCIm , and the Minnesota Department of Public Service (the Department) filed reply comments.

The Commission met on September 29, 1998 to consider this matter.

FINDINGS AND CONCLUSIONS

I. OVERVIEW

The Commission has examined both petitions for reconsideration and concludes that, with one exception, they should be denied. With that one exception, which the Commission will address below in Section II, the parties' petitions do not expose errors or ambiguities in the original Order or persuade the Commission that it should reverse or modify its decision in the July 29, 1998 Order. In addition to clarifying its intent with respect to one issue raised by USWC, the Commission will discuss in Section III the stay issue raised by MCIm.

II. TIME LIMITS FOR DELIVERY OF INTERCONNECTION FACILITIES

A. USWC's Request

USMC noted that Ordering Paragraph 4 requires USWC to deliver all interconnection facilities within the time limits prescribed in the USWC/MCIm interconnection agreement. The problem, USWC indicated, is that the interconnection agreement does not provide any particular installation

130

intervals. In these circumstances, USWC suggested, Ordering Paragraph 4 should be clarified to require USWC to follow its standard interval guides for installation intervals for MCIm as well as any other group including itself.

Second, USWC requested reconsideration and deletion of the Order's statement that USWC should provide service guarantees for service installations that are provided late, and that the parties should negotiate such guarantees and provide proposals to the Commission within 60 days of the Order. USWC objected to a mandate that it unilaterally provide service guarantees beyond the negotiated agreement of the parties.

Finally, USWC stated that a separate open docket (Docket No. P-442,5321,421/CI-97-381) is a more appropriate proceeding in which to deal with intervals and incentives.

B. Other Parties' Positions

MCIm stated that the Commission clearly intended that USWC provide service order guarantees as an appropriate enforcement of USWC's obligations to deliver facilities in a timely manner. MCIm stated that the Commission's directive was justified by the record. For example, MCI noted, the evidence showed that USWC very frequently fails to deliver facilities on its own committed due date. MCIm further noted that the Commission properly found that failure to meet delivery date commitments is a serious matter, causing substantial inconvenience to MCIm customers and needless disruption and embarrassment to MCIm. MCIm stated that service order guarantees will give USWC an incentive to meet its commitments. MCIm concluded that if the Commission feels it is appropriate to add an ordering paragraph reflecting this remedy, it should do so.

Regarding USWC's suggestion that the issue be deferred to another docket, MCIm concluded that since the Commission has before it the evidence it needs to conclude such incentives are necessary, there is no need to await conclusion of yet another docket before providing a remedy.

The Department also recommended that the Commission reject USWC's request to delete the Order findings requiring USWC to provide service guarantees. The Department noted that the Commission has broad authority (under statute as well as under the Interconnection Agreement) to provide a remedy for USWC's failure to provide MCIm with adequate service, i.e. timely installation of facilities. The Department stated that the requirement to provide service guarantees is a valid mechanism to enforce USWC's duty to comply with the Interconnection Agreement and provide adequate service to MCIm.

Finally, the Department urged the Commission not to defer consideration of service guarantees to the Service Quality docket as advocated by USWC. The Department stated that MCIm has a right to have its complaint against USWC resolved now instead of at some uncertain future date.

C. Commission Analysis and Action

In asserting that the Interconnection Agreement provided no particular installation intervals, USWC reiterated an argument previously made by USWC and addressed by the Commission. In its Order at page 7, the Commission stated:

> The Commission finds that USWC has breached the cited section. While the cited section is not a model of clarity (no specific time intervals for FOCs are stated), it is indisputable that the parties attached some importance to timely provision of FOCs. The Commission finds that this section stands for that mutual intention and, further, that USWC's performance regarding FOCs violated the expectation of reasonable timeliness that this section represents.
>
> USWC's defense that all MCIm orders are complex (and, therefore, that a longer period to provide the FOC should be applied) is unavailing. USWC's own filings (reflecting USWC's own classification of orders as "simple" or "complex") show that USWC's performance measured in the light of its own evidence repeatedly fails to meet the contractual standard, reasonable timeliness. The evidence shows that USWC has never provided an FOC within two business days for any MCIm local interconnection order and that the average period it took USWC to provide an FOC was 35 business days. In these circumstances, USWC's performance clearly violated the companies' agreement (mutual expectation of reasonable timeliness) regarding provision of FOCs.
>
> The Agreement states the time for providing a FOC for LIS trunks to MCIm in terms of the standard interval for Switched Access Service. The fact that it turns out that USWC's **Service Interval Guide** does not list a standard interval for Switched Access Service does not get USWC off the hook. USWC cannot claim that there is no standard interval for providing FOCs for LIS Trunks (and therefore that its performance cannot be found unsatisfactory) just because it turns out that its **Service Interval Guide** doesn't set one for Switched Access Service. Section 4.3.3 clearly has **some** meaning, i.e. to establish some provisioning interval requirement applicable to LIS Trunks. In the absence of a specific written standard interval for LIS trunks, the Commission concludes that the parties would intend a reasonable interval to apply.
>
> The record shows that USWC uses a 2-day interval for issuing FOCs when provisioning local interconnection trunks where facilities are in place. The Commission finds that USWC's **de facto** established interval provides a reasonable standard by which USWC's performance with respect to provisioning LIS trunks can be measured. In that light, USWC's performance (35 days, on average, to provide an FOC) clearly breached the companies' agreement.

Order at pages 7-8.

Accordingly, the interconnection agreement time limit referred to in Ordering Paragraph 4 of the July 29, 1998 Order is USWC's ***de facto*** established interval, i.e. a 2-day interval for issuing FOCs when provisioning interconnection trunks where facilities are in place.

Regarding USWC's second point, the Commission finds that its finding in the July 29, 1998 Order regarding service guarantees for service installations (Section B,4) was sound and should not be deleted. The record clearly demonstrates that USWC failed to install service on time and, in so doing, failed to provide MCIm with adequate service.
To remove any ambiguity, the Commission will reiterate that it is indeed its intent that USWC provide service guarantees for service installations that are provided late, as indicated at page 9 of its Order. To reinforce the point, the Commission will add the following language as an Ordering Paragraph in this Order.

USWC shall provide service guarantees for service installations that are provided late; the parties shall negotiate these guarantees and provide proposals to the Commission within 60 days from the date of ***this Order***.[1]

Finally, since the need to require service installation guarantees has been established in this proceeding, it would not be appropriate to withhold this remedy and defer the issue to Docket No. P-442, 5321, 421/CI-97-381, as requested by USWC.

III. STAY OF PORTIONS OF THE INTERCONNECTION AGREEMENT

A. MCIm's Request

MCIm requested that the Commission amend its July 29, 1998 Order by deleting the last two paragraphs of Section IV,C (page 12) and inserting the following:

> USWC is directed to fill all pending and future orders, including test orders, for network elements and combinations of elements in Minnesota.

MCIm further requested that the Commission amend its Order by striking the language of Ordering Paragraph 7 and inserting the following:

> USWC is directed to fill all pending and future orders, including test orders, for network elements and combinations of elements in Minnesota.

In support of its request, MCIm argued that the Commission's decision was inconsistent with the clear language of the Interconnection Agreement and the policies of State of Minnesota that encourage the development of competition.

As an alternative, MCIm requested that the Commission defer any decision on this issue until it has had an opportunity to consider the evidence in the USWC Generic Cost Proceeding showing that the ability of CLECs to obtain combinations of elements is essential for the development of competition.

B. Other Parties' Positions

USWC recommended that the Commission reject MCIm's request to abandon the stay. USWC reiterated its legal arguments that the Commission has no authority to enforce a provision of the Interconnection Agreement in the absence of overturned federal rules that had been the basis for the Commission's imposition of the provision in question in he first place. USWC also argued that enforcement of the provision would be inappropriate as a matter of policy as well.

Regarding MCIm's alternative recommendation that the Commission simply defer any decision on this issue pending the receipt of evidence from the Generic Cost Proceeding, USWC noted that the

---

[1] The term "this Order", of course, refers to this ORDER AFTER RECONSIDERATION rather than the July 29, 1998 Order. The parties' negotiated proposal regarding service guarantees, therefore, will be due 60 days from October 22, 1998, the date of this ORDER AFTER RECONSIDERATION.

Commission had elected to stay its order to await the Supreme Court's resolution of purely legal questions concerning the intent and interpretation of the Telecommunications Act. USWC stated that MCIm did not suggest how evidence from the Generic Cost Docket would shed any light on the preemptive effect of the Telecommunications Act.

The Department supported MCIm's alternative request to defer a decision to receive evidence from the Generic Cost Docket. The Department stated that to do so would provide a fuller context, including the views of parties to the Generic Cost Docket (such as AT&T and the OAG) that are not part of the current (MCIm's complaint) proceeding. In the light of this wider record, the Department indicated, the Commission would be in a better position to evaluate the effect on competition of requiring USWC to combine UNEs.

C. Commission Analysis and Action

The Commission concludes that it properly stayed enforcement of the agreement's testing provisions, as decided in the July 29, 1998 Order. Order at page 12 and Ordering Paragraph 8 at page 15.

The evidence that USWC and the Department want the Commission to consider from the Generic Cost Docket goes to the issue of whether **as a matter of policy** it is appropriate for the Commission to enforce the provisions in question. However, the reason the Commission stayed enforcement of these provisions was because there is adequate doubt to give the Commission pause regarding the Commission's authority as a matter of law to enforce such provisions. In its Order, the Commission has exercised appropriate caution and deference to federal court authority by declining to enforce these provisions in the face of imminent review by the Supreme Court. The Supreme Court's decision may well provide considerable light on the Commission's appropriate path with this issue.

The Commission notes that in supporting the alternative (deferral of the issue), MCIm and the Department both accept that enforcement of the provisions in question will not be required at this time. In practical effect, then, the parties' proposal to "defer" the Commission's decision regarding the enforcement issue is quite similar to the Commission's decision to "stay" enforcement of those provisions. The only difference is that under the parties' proposal the Commission would not decide about enforcing the provisions until it received information from the Generic Cost Docket, rather than not enforcing them "until 60 days after the decision by the Supreme Court regarding the 8th Circuit's decision" as the Commission decided in its Order. See Order at page 12.

The Commission believes that the question of the Commission's legal authority to enforce the provision must be resolved before examining the policy question (whether it is good policy to do so given its effect upon competition). Therefore, the Commission will await the light to be provided by the Supreme Court on the Commission's legal authority prior to proceeding with any further consideration of enforcement. If, following review of the Supreme Court's decision, it is determined that consideration of enforcement is appropriate, such consideration would involve the policy question for which the Generic Cost Docket information may well be quite helpful, as MCIm and the Department have suggested.

Accordingly, the Commission's stay (to allow receipt and examination of the Supreme Court decision before considering the enforcement issue further) is appropriate and will be maintained.

ORDER

1. The petitions for reconsideration filed by USWC and MCIm regarding the Commission's July 29, 1998 Order in this matter are denied, except as to USWC's request regarding Ordering Paragraph 4, as discussed in the text of this Order at pages 2 to 4.

2. Having reconsidered the Commission's finding at page 9 of the July 29, 1998 Order that USWC should provide service guarantees for service installations that are provided late and that parties should negotiate such guarantees and provide proposals to the Commission within 60 days of the Order in this case, the Commission affirms that this sentence indeed reflects the Commission's intent, then and now. To emphasize the point, the Commission adopts the following language as Ordering Paragraph language in this ORDER AFTER RECONSIDERATION:

   USWC shall provide service guarantees for service installations that are provided late; the parties shall negotiate these guarantees and provide proposals to the Commission within 60 days from the date of this Order.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner

In the Matter of a Complaint of MCImetro Access Transmission Services, Inc. Against U S WEST Communications, Inc. for Anticompetitive Conduct

ISSUE DATE: September 18, 2000

DOCKET NO. P-421/C-97-1348

ORDER APPROVING SETTLEMENT

PROCEDURAL HISTORY

On February 8, 1996, the President signed into law the Telecommunications Act of 1996 (the Act), Pub. L. 104-104, 110 Stat. 56. The Act's purpose is to provide the benefits of competition to U.S. citizens by opening all telecommunications markets to competition. (Conference Report accompanying S. 652). The Act opens markets by, among other things, requiring incumbent local exchange carriers to unbundle the elements of their networks and make them available to competitors on just, reasonable, and nondiscriminatory terms.
47 U.S.C. § 251(c).

Under the terms of the Act, a competitive local exchange carrier (CLEC) desiring to provide local service can seek agreements with an incumbent telephone company related to interconnection with the incumbent's network, the purchase of retail services at wholesale rates for resale, and the purchase of the incumbent's unbundled network elements (UNEs).
47 U.S.C. §§ 251(c) and 252(a). If the incumbent and the CLEC cannot reach an agreement within the time frame specified in the Act, either party may petition the State commission to arbitrate unresolved issues and to order terms consistent with the Act. 47 U.S.C. § 252(b).

On March 17, 1997, the Commission approved interconnection agreements between U S WEST Communications, Inc. (now called Qwest Corporation) (USWC), an incumbent telephone company, and, among other parties, MCImetro Access Transmission Services, Inc. (now called Worldcom) (MCIm).[1]

---

[1]Docket No. P-3167, 421/M-96-729 In the Matter of AT&T Communications of the Midwest, Inc.'s, MCImetro Access Transmission Services, Inc.'s, and MFS Communications Company's Consolidated Petitions for Arbitration with USWC, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996; Docket No. P-442, 421/M-96-855 In the Matter of AT&T Petition for Arbitration of Rates, Terms and Conditions of Interconnection and Related Arrangements with USWC; Docket No. P-5321, 421/M-96-909 In the Matter of MCImetro Access Transmission Services, Inc., and USWC Arbitration and Request for Consolidation, ORDER RESOLVING ISSUES AFTER RECONSIDERATION

136

On September 4, 1997, MCIm filed a complaint against USWC for anticompetitive conduct and breach of the interconnection agreement.

On July 29, 1998, the Commission issued its ORDER FINDING BREACHES OF STATE LAW AND INTERCONNECTION AGREEMENT AND REQUIRING COMPLIANCE, NEGOTIATIONS AND FILINGS. Among other things, the Commission found that USWC had breached its interconnection agreement by failing to provide timely firm order confirmations (FOCs)[2] when MCIm ordered local interconnection service trunks (LIS trunks), a kind of UNE. Additionally, the Commission found that USWC had violated its statutory duty to provide adequate service by failing to provide the LIS trunks by the agreed-upon dates. The Commission directed USWC to provide "service guarantees" to MCIm regarding USWC's duty to provide FOCs in a timely manner. Additionally, the Commission directed USWC to negotiate with MCIm about what form those guarantees should take.

Finally, the Commission stayed USWC's obligation to fill orders for combinations of unbundled network elements pending the United States Supreme Court's review of Iowa Utilities Board v. FCC, 120 F.3d 753 (1997).

On October 22, 1998, the Commission issued its ORDER ON RECONSIDERATION directing the parties to also negotiate service guarantees regarding timely installation of LIS trunks.

On November 23, 1998, USWC filed an appeal of the Commission's orders in the United States District Court for the District of Minnesota.

On May 11, 2000, the parties filed their Minnesota Agreement for Commission approval. The agreement's Attachment A contains the guarantees negotiated by the parties. The parties also pledged to dismiss some (but not all) pending legal claims on these issues. But two issues remain unresolved:

- Whether the proposed settlement would amend the interconnection agreement between the parties, or represents a separate agreement, and
- Whether to clarify the Commission prior order regarding USWC's obligation to fill MCIm's orders for combined network elements.

On June 30, 2000, the Commission invited comment on these two issues. MCIm, USWC and the Department of Commerce (the Department) responded.

The Commission met on August 29, 2000 to consider this matter. The Commission heard argument from the Department, MCIm, USWC and Eschelon Telecom, Inc. (Eschelon), another CLEC.

AND APPROVING CONTRACT (March 17, 1997).

[2]A FOC consists of a document confirming, summarizing and stating a date for completing the order.

[blank]

FINDINGS AND CONCLUSIONS

This decision will address three matters:

- Approval of the parties' proposed resolution,
- The status of that resolution, and
- USWC's obligation to combine UNEs for the benefit of competitors.

I. ANALYSIS OF THE PROPOSED SETTLEMENT AGREEMENT

MCIm, USWC and the Department ask the Commission to approve an agreement setting forth service guarantees in the form of deadlines for compliance, and financial penalties for failure to meets such deadlines. The Commission has reviewed the terms of the agreement, and finds that they set forth performance guarantees as ordered. Some of the terms are summarized below:

A. Parties

The agreement is joined by three local operating affiliates of MCI WORLDCOM, Inc. – MCImetro Access Transmission Services, LLC, MCI WORLDCOM Communications, Inc. and Brooks Fiber Communications of Minnesota, Inc. (collectively, MCIW) – and USWC. USWC's Minnesota Agreement (May 11, 2000).

B. Start and end dates

The agreement would take effect upon Commission approval, but the service order guarantees would not take effect until the beginning of the first month following the month in which the Commission approves the agreement. *Id.*, ¶ 9. The agreement would "terminate on the same date that the Interconnection Agreements terminate or are replaced by subsequent interconnection agreements." *Id.*, ¶ 4.

C. FOC deadlines

The agreement sets forth a schedule for when USWC would issue a FOC (stating when USWC would fulfill the order) in response to MCIW placing an order. The larger the amount of bandwidth that MCIW requests in any given order, the longer USWC has to issue a FOC stating when the order would be filled. *Id.*, Attachment A, ¶ 1.2.

D. Guarantees to Provide Timely FOCs

USWC would owe MCIW $500 for each missed deadline to provide a FOC. *Id.*, Attachment A, ¶¶1.3, 1.4. However –

- USWC is deemed to have met a deadline if it issues a FOC within two business days of the scheduled date. *Id.*, Attachment A, ¶1.3.
- No sum would accrue for any calendar month in which USWC met 95% of its deadlines. *Id.*, Attachment A, ¶1.3.
- The 95% figure would not reflect the number of FOCs USWC provides late when USWC lacks the facilities to fulfill the order at the time MCIW places it, and USWC has not yet projected when such facilities would become available. *Id.*, Attachment A, ¶ 1.1.

139

- The guarantee only applies to orders for LIS Trunks pursuant to an interconnection agreement. *Id.*, Attachment A, ¶1.5.
- The guarantee does not apply to FOCs unreasonably delayed by MCIW's acts or omissions, or reasonably delayed by *force majeure* events. *Id.*, Attachment A, ¶1.5.
- The guarantee does not apply to large orders unless MCIW uses commercially reasonable efforts to give USWC five business days notice of the order. *Id.*, Attachment A, ¶ 2.

E. Guarantees to Timely Install LIS Trunks

USWC would owe MCIW up to $1000 for each missed deadline to install LIS Trunks. *Id.*, Attachment A, ¶¶ 3.3. However –

- No payment amount would accrue for any day for any trunk route in which MCIW was using less than 75% of the existing trunk capacity. *Id.*, Attachment A, ¶ 3.1.2.
- No payment amount would accrue for any calendar month in which USWC met its service objectives of up to 92% of its deadlines. *Id.*, Attachment A, ¶ 3.2.
- The guarantee only applies to orders for LIS Trunks pursuant to an interconnection agreement. *Id.*, Attachment A, ¶ 3.1.1.
- The guarantee does not apply to LIS Trunks unreasonably delayed by MCIW's acts or omissions, or reasonably delayed by *force majeure* events. *Id.*, Attachment A, ¶¶ 3.1.3, 3.1.4.

The amount of Installation Payment due for any missed order would reapply every 30 days until the order was fulfilled. *Id.*, Attachment A, ¶¶ 3.4. If USWC failed to achieve the service objectives for three consecutive months, the payment amounts could double. *Id.*, Attachment A, ¶¶ 3.5.

F. Ancillary legal matters

The parties agree to withdraw various pleadings arising from this matter, including MCI's allegations that USWC failed to negotiate in good faith, and certain USWC's claims in the of the Commission's orders in federal court. *Id.*, ¶ 3.

G. "Voluntarily negotiated...."

The agreement states, "The Parties agree not to refer to this Agreement as containing language voluntarily negotiated by U S WEST." *Id.*, ¶ 6.

H. Conclusion

No party objected to the agreement as filed. The Commission finds it curious that the agreement prohibits MCIW from characterizing the agreement as "voluntarily negotiated," but no party alleged that this concession by MCIW harmed the public interest. On that basis, and upon a review of the entire record, the Commission finds the Minnesota Agreement reasonable and will approve it.

II. AGREEMENT'S STATUS

While MCIm and USWC were able to reach agreement about the substance of issues dividing them, they could not agree about the legal status of their agreement. Specifically, MCIm argues that the Minnesota Agreement's Attachment A amends its interconnection agreement with

USWC. USWC argues that it merely constitutes a side agreement, separate from the interconnection agreement. This distinction matters because an incumbent local telephone company must offer the terms of any interconnection agreement to all other telecommunications carriers that request interconnection. 47 U.S.C. § 252(i).

USWC argues that it is unnecessary to treat this settlement as an amendment to an interconnection agreement. The Commission ordered USWC to negotiate service guarantees based on the Department's recommendation. USWC notes that neither the Department's recommendation nor the Commission orders require that the resulting agreement be made part of the interconnection agreement. USWC will honor the agreement in any event. Carriers that wish to have similar terms in their own interconnection agreements are free to negotiate them with USWC directly. Moreover, Minnesota carriers have an obvious substitute to adopting the proposed settlement language: they may participate in the public docket created to examine USWC's wholesale service quality.[3]

The Commission is not persuaded. To open the local telecommunications market to competition, Congress directed incumbent local telephone companies to permit competitors to interconnect on reasonable terms. And, where terms are deemed reasonable for one party, they should be deemed reasonable for other parties as well. This principle is reflected in 47 U.S.C.§ 252(i), as noted above. Furthermore, an incumbent telephone company must offer nondiscriminatory access to UNEs, 47 U.S.C. § 251(c)(3), and interconnection that is at least equal in quality to that provided to any other party, § 251(c)(2)(C). The terms of Attachment A have prospective application governing the quality of service that USWC will offer MCIW. Having found the terms of Attachment A reasonable, the Commission is compelled to ensure that other CLECs have the opportunity to receive USWC's service on an equal basis. § 252(e)(2)(B).

Moreover, even if the Commission were not required to conclude that Attachment A amends the USWC/MCIW interconnection agreements, the Commission has ample reason to prefer that result. The self-executing nature of the agreement may promote administrative efficiency and avert future complaints. Both the Department and Eschelon note that making this agreement a part of MCIW's interconnection agreements – thus making it available to other CLECs – would spare other CLECs, government agencies, and USWC itself the expense of re-litigating this issue in the context of other interconnection agreements. That is no small consideration: The Department notes that the interconnection language that Attachment A is designed to effectuate is virtually identical to the language in the USWC/AT&T interconnection agreement; that interconnection agreement has been widely adopted by other CLECs.

Of course, nothing in this decision will impair a CLEC's discretion to negotiate or arbitrate for different terms. This decision will merely make the Attachment A terms available for adoption.

For the foregoing reasons, the Commission finds that the Minnesota Agreement's Attachment A modifies MCIW's interconnection agreements.

---

[3]In the Matter of USWC Proposed Wholesale Service Quality Standards, Docket No. P421/AM-00-849.

III. USWC'S OBLIGATION TO COMBINE UNEs

In the July 29, 1998, ORDER FINDING BREACHES OF STATE LAW, the Commission stayed USWC's obligation to fill orders for combinations of unbundled network elements pending the United States Supreme Court's review of Iowa Utilities Board v. FCC, 120 F.3d 753 (1997). The Commission has not subsequently addressed the matter in this docket.

But in separate dockets, the Commission approved various interconnection agreements involving USWC. USWC asked the federal court to find that the Commission exceeded its authority in establishing some of the terms of these agreements.[4] In particular, USWC challenged Commission decisions directing USWC to combine any unbundled network elements that are "logically related," whether or not they are ordinarily combined.

On March 30, 1999 the United States District Court, District of Minnesota, issued Orders in the appeals. Among other things, the Court found that "to the extent the Agreements require U S WEST to combine network elements that it does not ordinarily combine, they violate the Act." The court remanded this matter to the Commission for further proceedings.[5]

On March 14, 2000 in Docket No. P-421/CI-99-786 In the Matter of the Federal Court Remand of Issues Proceeding from the Interconnection Agreements Between U S WEST Communications, Inc. and AT&T, MCI, MFS, and AT&T Wireless the Commission completed the proceedings by issuing its ORDER AFTER REMAND. In it, the Commission said:

> The agreements' language must be changed to clarify that (1) U S WEST must combine network elements of the type that it currently combines in its network; and (2) U S WEST is not obligated to combine elements of the type that it does not normally combine in its network.
>
> * * *
>
> The FCC rule at issue reads as follows:
>
> > (b) Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.
> >
> > 47 C.F.R. § 315 (b).

---

[4]Docket No. P-3167, 421/M-96-729 In the Matter of AT&T Communications of the Midwest, Inc.'s, MCImetro Access Transmission Services, Inc.'s, and MFS Communications Company's Consolidated Petitions for Arbitration with USWC, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996; Docket No. P-442, 421/M-96-855 In the Matter of AT&T Petition for Arbitration of Rates, Terms and Conditions of Interconnection and Related Arrangements with USWC; Docket No. P-5321, 421/M-96-909 In the Matter of MCImetro Access Transmission Services, Inc., and USWC Arbitration and Request for Consolidation.

[5] U S WEST Communications, Inc. v. Minnesota Public Utilities Commission et al., Civ. 97-913, slip op. (D. Minn. March 30, 1999), pp. 18-20.

> The Federal District Court remanded the Commission's original decision for further consideration, finding that "to the extent the Agreements require U S WEST to combine network elements that it does not *ordinarily* combine, they violate the Act" (emphasis added). The Court, like this Commission, apparently read the "currently combines" language of the FCC rule as referring to the company's normal business practices and ordinary operation of its network, not as referring to the specific network configuration it uses for each of its two million customers.

Now, the Department, MCIm and USWC each urge the Commission to clarify that these findings regarding USWC's obligation to combine UNEs apply with equal force in the current docket. The Commission finds this request reasonable, and will clarify that USWC's provision of combined network elements under the MCIW/USWC arbitrated interconnection agreement is modified and governed by the Commission's findings in its March 14, 2000 ORDER AFTER REMAND.

ORDER

1. The Minnesota Agreement between USWC and MCIW, filed May 11, 2000, is approved.

2. The Minnesota Agreement Attachment A, attached, amends the interconnection agreements between USWC and MCIm adopted in the consolidated dockets Docket No. P-3167, 421/M-96-729 In the Matter of AT&T Communications of the Midwest, Inc.'s, MCImetro Access Transmission Services, Inc.'s, and MFS Communications Company's Consolidated Petitions for Arbitration with USWC, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996 and Docket No. P-5321, 421/M-96-909 In the Matter of MCImetro Access Transmission Services, Inc., and USWC Arbitration and Request for Consolidation.

3. USWC's provision of combined network elements under the above-cited arbitrated interconnection agreements is modified and governed by the Commission's findings in its March 14, 2000 ORDER AFTER REMAND in Docket No. P-421/CI-99-786 In the Matter of the Federal Court Remand of Issues Proceeding from the Interconnection Agreements Between U S WEST Communications, Inc. and AT&T, MCI, MFS, and AT&T Wireless.

4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

APPENDIX I

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of a Complaint by InfoTel Communications, LLC v. U S WEST Communications, Inc. Concerning Resale of Contract Services

ISSUE DATE: May 21, 1998

DOCKET NO. P-421/C-98-10

ORDER CONSTRUING TARIFFS AND PROHIBITING TERMINATION CHARGES IN RESALE CONTEXT

PROCEDURAL HISTORY

On January 2, 1998 InfoTel Communications, LLC (InfoTel), a competitive local exchange carrier, filed a complaint against U S WEST Communications, Inc. (U S WEST), an incumbent local exchange carrier with whom InfoTel has an interconnection and resale agreement. InfoTel claimed that U S WEST was violating the terms of the agreement, the federal Telecommunications Act of 1996, and Minnesota's telecommunications statutes by imposing termination charges on customers choosing to substitute InfoTel for U S WEST as the carrier in ongoing contracts for the provision of specialized telecommunications services for specific time periods at discount prices.

On March 2, 1998 U S WEST filed an answer. The company admitted imposing the termination charges but denied that doing so violated the parties' interconnection and resale agreement or any state or federal law. The company denied that existing contractual arrangements were telecommunications services subject to resale requirements and claimed that what InfoTel sought was more properly characterized as the involuntary assignment of ongoing contracts.

The two companies conducted discovery and filed affidavits and legal memoranda.

On April 13, 1998 the Department of Public Service (the Department) filed comments concurring with U S WEST.

On May 6, 1998 the Commission heard testimony and oral argument from the parties.

On May 12, 1998 the Commission met to decide the matter.

FINDINGS AND CONCLUSIONS

I. Introduction and Background

Under state and federal law U S WEST is required to permit competitors to interconnect with its network on competitive and non-discriminatory terms and to permit competitors to purchase its services at wholesale and sell them at retail. 47 U.S.C. § 252(c); Minn. Stat. § 237.16. Both state and federal law prohibit U S WEST from imposing unreasonable or discriminatory restrictions or limitations on such resale. 47 U.S.C. § 251(b)(1); Minn. Stat. § 237.121 (a) (5).

U S WEST and InfoTel have entered into an interconnection and resale agreement, in which the parties agree that InfoTel may purchase essentially all of U S WEST's services for resale at a wholesale discount of 21.5% below U S WEST's retail prices. The 21.5% wholesale discount was set by the Commission in an earlier proceeding; it represents, as required by federal law, the retail rate minus any marketing, billing, collection, and other costs that will be avoided by selling wholesale instead of retail. 47 U.S.C. § 252(d)(3).)

In the interconnection and resale agreement, U S WEST agrees to provide wholesale to InfoTel all telecommunications services it currently provides, "including contract service arrangements." U S WEST also agrees to obey all federal and state laws regarding its resale obligations, to remove from its tariffs any provisions not in compliance with those obligations, and to refrain from imposing unreasonable or discriminatory conditions or limitations on InfoTel's resale of its services.

The termination charges at issue appear both in U S WEST's tariffs and in the contracts between U S WEST and its term discount customers. The relevant tariff provision reads as follows:

> **2.2.14 TERMINATION OF SERVICE (CONT'D)**
>
> * * * * * *
>
> B. Termination Liability/Waiver Policy
>
> Services provided via service agreements may be subject to the Termination Liability/Waiver Policy. This policy applies only to services that specifically reference this Termination Liability Waiver Policy in their respective section of this Tariff.
>
> * * * * * *
>
> 2. Complete Disconnect
>
> If the customer chooses to completely discontinue service, at any time during the term of the agreement, a termination charge will apply . . . .
>
> 3. Partial Disconnect
>
> If the customer discontinues a portion of their service, and that causes the

145

customer's monthly billing level to fall below the Minimum Billing Level of the agreement, a termination charge will apply to the portion of the service agreement that is below the Minimum Billing Level.

The services at issue are provided via service agreements, and the tariff pages describing the services do specifically reference the Termination Liability Waiver Policy. The termination charges for the services at issue are 15% to 25% of the minimum billing level for the remaining term of the contract.

II. Positions of the Parties

A. InfoTel

InfoTel maintains that the services being provided by U S WEST under these term discount contracts are telecommunications services and are therefore subject to the resale requirements of state and federal law, as well as the resale provisions of the parties' interconnection and resale agreement.

The company claims there is no practical, legal, or public policy justification for preventing the resale of these services -- preventing resale results in higher prices for consumers and has no financial effect on U S WEST, which makes the same profit either way. (As a matter of law, the wholesale rate is presumed to equal the retail price, minus costs incurred solely for retail purposes.)

B. U S WEST

U S WEST denied that existing contractual arrangements were telecommunications services subject to resale requirements and claimed that what InfoTel sought was more properly characterized as the involuntary assignment of ongoing contracts. This, the company said, was improper as a matter of public policy and constitutional law.

The company emphasized that InfoTel could purchase wholesale the same discounted term service packages at issue, it just could not step into term service packages already in operation without its customers incurring termination charges. The company stated that permitting InfoTel to take U S WEST's place in existing term contracts would drive up prices, since the company would have no incentive to keep offering term discount packages.

Finally, U S WEST claimed that having to accept the wholesale discount for services provided under existing term contracts might keep it from recovering costs, since it incurs significant marketing and capital costs at the beginning of each contract term, which can only be recovered by completion of the contract. U S WEST also claimed that it needed the revenue generated by termination charges to recover its costs.

C. The Department of Public Service

146

The Department argued that the unfinished or unexpired portion of a term contract is not a "telecommunications service" and is therefore not subject to state and federal resale requirements.

The Department also argued that permitting resellers to displace incumbents on existing term contracts would drive incumbents out of the term contract market, since they could never make the lowest offer. This in turn would drive up costs to consumers.

III. Commission Action

For the reasons set forth below, the Commission finds that U S WEST's tariffs do not authorize termination charges in a resale setting. It is therefore unnecessary to reach InfoTel's claim that the tariffs constitute an unreasonable limitation on resale or U S WEST's claim that its alleged inability to recover costs through resale setting justifies prohibiting resale.

A. The Plain Meaning of the Tariff

The tariff language has been set forth earlier. Under that language, termination charges apply only when there is a "complete disconnect" (when "the customer chooses to completely discontinue service") or a "partial disconnect" (when "the customer discontinues a portion of their service"). There is no category for "changing to a resale vendor"; U S WEST treats that situation as a complete disconnect.

In those cases, however, there is no disconnect, complete or otherwise. Service is transferred without interruption from one company to another. The customer has not chosen to "completely discontinue service"; the customer has chosen to continue service, in the same manner, through the same facilities and equipment, with another carrier.

A complete disconnect or complete discontinuation of service would end the revenue stream from the customer. Here, the revenue stream continues -- at the wholesale level -- and is guaranteed by the reseller. Clearly, switching from U S WEST to a competitor reselling U S WEST's services is not the same thing as disconnecting or discontinuing service.

The plain meaning of the tariff, then, compels the conclusion that it does not apply in a resale context.

B. The Purpose of the Tariff

Not only does the literal language of the tariff compel this conclusion; so does its underlying purpose, which is to ensure a continuing revenue stream for cost recovery purposes.

On August 14, 1997 U S WEST filed a petition to revise its termination charges across the board. <u>In the Matter of the Petition of U S WEST to Revise its Termination Liability Assessments,</u> Docket No. P-421/EM-97-1242. In its comments, the Department explained the company's rationale as follows:

> U S WEST believes that the flat TLA [termination liability assessment] factor is

147

> inappropriate given the recent changes in the telecommunications environment. U S WEST is concerned, because it may not always recover its investment when a customer terminates service early. U S WEST has stated that the factors to be considered in determining the TLA for each service include (i) capital investment commitments necessary to deploy a service and (ii) the discount available under the term contract. Generally, the TLA will increase as these two factors increase.

In its summary Order approving the revisions, the Commission adopted the Department's recommendations, which were based on the need "to ensure cost recovery as it [U S WEST] deploys new facilities and technology."

In short, the purpose of the tariff, like the language of the tariff, focuses on ensuring U S WEST *some* recovery in situations in which its revenue stream is ending. That is not the case here. Here, not only is the revenue stream not ending; it is in theory continuing at the same level.[1]

Neither the tariff language nor its purpose supports its use in the resale context. It clearly does not apply in resale situations.

C. Conclusion

The tariffs at issue are narrowly drafted and must be narrowly construed. Both their plain meaning and their underlying purpose apply only to cases involving complete disconnection and total loss of revenue. They do not apply in the resale context, and U S WEST will be prohibited from so applying them.

ORDER

1. U S WEST shall not charge termination fees to contract customers who choose to take the same contract services from another carrier if that carrier purchases the same services wholesale from U S WEST.

---

[1]As a matter of law, wholesale rates are presumed to equal retail rates minus costs incurred solely for retail purposes. Although U S WEST stated in the pleadings that it would fail to recover its costs if InfoTel were allowed to displace it in these contracts, the record is inconclusive. The financial information in the record at the end of hearing established an ability to recover costs. At deliberations on May 12 the Company produced an affidavit contradicting its earlier testimony on costs, setting ongoing operational costs for a representative service at 60% of capital expense instead of the 5% originally claimed. Not only would this place costs in a different order of magnitude than claimed throughout this proceeding, it would be inconsistent with the company's central claim that most of the costs for the services at issue are incurred at the beginning of the contract term. Since the tariff does not permit termination charges in the resale context, however, it is unnecessary to decide the merits or the significance of the cost issue.

2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (612) 297-4596 (voice), (612) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

APPENDIX J

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of U S WEST Communications, Inc.'s Introduction of MegaBit Services

ISSUE DATE: June 16, 1999

DOCKET NO. P-421/EM-98-471

In the Matter of a Complaint Relating to U S WEST Communications, Inc.'s Promotion of its MegaBit Services

DOCKET NO. P-421/C-98-997

ORDER ACCEPTING SETTLEMENT AGREEMENTS

PROCEDURAL HISTORY

In April 1998, U S WEST Communications, Inc. introduced a new line of services, MegaBit services, which permit customers to conduct telephone conversations and high-speed data transmission at the same time, using a standard phone line. The services were designed to appeal to Internet users, telecommuters, and businesses wishing to link multiple work sites with a single computer system. MegaBit services move data at 5 to 250 times the speed of traditional technology.

On July 9, 1998, the Department of Public Service (the Department) filed a complaint claiming that U S WEST was violating Minn. Stat. § 237.626 by running a promotion of MegaBit services without first notifying the Commission and without filing cost information demonstrating that promotional prices covered incremental cost. This complaint was assigned docket number P-421/C-98-997.

On September 10, 1998, a second complaint was filed, this time by the Department and the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG). This complaint claimed that U S WEST's marketing and delivery of MegaBit services violated the resale and non-discrimination provisions of state and federal laws governing local telephone competition. This complaint was assigned docket number P-421/EM-98-471.

On October 14, 1998, the Commission issued an Order that noted probable jurisdiction over both complaints, established a procedural framework for addressing them, and resolved discovery disputes between the parties.

On November 20, 1998, the Commission referred specific issues from both dockets to the Office of Administrative Hearings for evidentiary development before an Administrative Law Judge. The Commission retained jurisdiction over those issues that did not require evidentiary development.

On January 25, 1999, the Administrative Law Judge permitted SIHOPE Communications, Inc., an Internet service provider, to intervene in the proceeding, but cautioned that this decision did not expand the scope of the hearing beyond that defined by the Commission's Notice and Order for Hearing.

Over the course of contested case proceedings, U S WEST, the Department, and the RUD-OAG entered into and filed three separate settlement agreements. These agreements resolved, deferred, or established procedures to resolve, all issues in both complaints.

On February 8, 1999 the Administrative Law Judge issued an Order and Memorandum that recommended accepting all three agreements as in the public interest. The Memorandum stated that SIHOPE had agreed not to oppose the agreements in return for U S WEST's waiver of certain defenses it might otherwise have raised in a civil damages action planned by SIHOPE.
On January 25, 1999 Richard Baker, who was not a party to the case, filed comments. Mr. Baker raised two claims: (1) that the technical process of providing MegaBit service effectively "slams" MegaBit subscribers from state-regulated local service to an unregulated hybrid service, raising issues of privacy, consumer protection, and state authority; and (2) that on at least two occasions, U S WEST has billed customers for MegaBit services before those services were up and running.

On May 27, 1999, the matter came before the Commission. All four parties -- the Department, the RUD-OAG, U S WEST, and SIHOPE -- appeared, as did Mr. Baker. The Department, the RUD-OAG, and U S WEST supported the three settlement agreements. SIHOPE opposed them. Mr. Baker opposed them.

Having reviewed the record and having heard oral argument, the Commission makes the following findings, conclusion, and Order.

FINDINGS AND CONCLUSIONS

I. Factual Background

A. MegaBit Services

MegaBit services combine digital technology with standard copper wire to increase Internet access speeds -- and other data transmission speeds -- by 5 to 250 times the speed of traditional technology. They also permit customers to transmit data and carry on telephone conversations simultaneously, using a single line. The services are designed to appeal to Internet users, telecommuters, and businesses wishing to link multiple work sites with a single computer system.

The service requires two MegaBit connections, one at the end-user's home or office and one at the Internet service provider or other hub through or to which the end-user will transmit data. The end-user service is called MegaSubscriber service; the hub service is called MegaCentral service.

Under the tariff at issue, MegaSubscriber rates run from $40 to $875 per month, depending upon transmission speed. Installation, set-up, and equipment fees total $405.

MegaCentral monthly rates run from $910 per port to $1,456 per port, with additional monthly charges of $5 or $10 per Central Office Connecting Channel, and non-recurring charges of $520.

B. The Complaints

This case involves two complaints, one claiming violations of the state statute regulating telephone service promotions, the other claiming violations of state and federal laws regulating local telephone competition.

Each complaint, together with the resolution proposed by the parties, is discussed below.

C. The Promotion Complaint

This complaint claimed that U S WEST failed to follow statutory procedures when it ran a promotion of MegaSubscriber services in May 1998, offering new subscribers a free digital modem, free Internet access set-up, and reduced-price site set-up and training.

Minnesota law requires telephone companies running promotions to notify the Commission in advance, to price promoted services above incremental cost, and to file cost information demonstrating that promotional prices cover incremental cost. Minn. Stat. § 237.626. The Department claimed U S WEST failed to notify the Commission, failed to file cost information, and may have failed to price the services promoted above incremental cost.

The parties did not settle this complaint, but agreed to submit it to the Commission for decision based on initial and reply comments, to be filed on a schedule negotiated between the parties.

D. The Competition Complaint

This complaint made two claims. The first was the legal claim that U S WEST's refusal to offer MegaBit services at wholesale rates to competing carriers violated state and federal resale requirements.[1] The parties agreed to defer this issue until the company received a *bona fide* request for wholesale service from a competitor, and U S WEST reserved its right to challenge state jurisdiction over the issue.

The second claim, that U S WEST violated state anti-discrimination statutes in the marketing and provision of MegaBit services,[2] had a much broader focus and included the following allegations:

- U S WEST introduced and promoted MegaSubscriber services when it knew or should have known that it would not have the facilities and equipment necessary to meet demand for MegaCentral service from Internet service providers (ISPs). It gave preferential treatment to its own ISP by installing MegaCentral services there first. It then exploited the shortage of MegaBit capacity it had created to steer customers to its own ISP.

- U S WEST limited participation in the MegaSubscriber promotion to customers choosing an ISP that already had MegaCentral service, but failed to promptly fill MegaCentral service orders from ISPs. This drove many customers to leave their ISPs for U S WEST.NET, one of the few ISPs with MegaCentral service up and running during the promotion.

- U S WEST promoted its own and only its own ISP on its web site, along with its regulated services.

- U S WEST's standard responses to end-users inquiring about MegaBit services favored its ISP over others.

- U S WEST's tariffs contain no time lines, quality standards, or customer remedies for MegaCentral installation, creating opportunities for abuse.

- U S WEST's installation of MegaSubscriber services has resulted in some customers' ISPs being changed without their consent.

---

[1] Minn. Stat. § 237.121(5) and 47 U.S.C. § 251(c)(4).

[2] Minn. Stat. §§ 237.09, 237.121.

Working through these claims and designing a blueprint for change were clearly complex undertakings. Ultimately, however, the parties reached three agreements designed to level the playing field between U S WEST.NET and other ISPs, through a package of financial rebates, joint marketing efforts, and operational changes. The main provisions of the three agreements are summarized below.

Financial Rebates

- U S WEST will waive or credit the $45 it normally charges a MegaSubscriber customer to change ISPs, if the customer subscribed before December 31, 1998 and changed ISPs between May 1998 and 90 days after the Commission approves the settlement.

- U S WEST will spend $30,000 on credits to ISPs who ordered MegaCentral services on or before September 30, 1998 and experienced delays in installation.

Changes in Consumer-Targeted MegaBit Marketing

- End-users who already have an ISP and inquire about MegaBit services will be steered to a "safe harbor" where U S WEST.NET will not be marketed. If the caller's ISP does not have MegaCentral service, the caller will be referred to the yellow pages and to a web site listing all ISPs with MegaCentral service.

- U S WEST will list all MegaCentral subscribers on its web site. It will list new subscribers, not yet connected, as "pending," within two business days of executing a contract. It will remove the "pending" designation within two business days of activation.

- U S WEST will introduce new procedures, developed by the parties and designed to ensure competitive neutrality among ISPs, for filling MegaSubscriber orders.

Joint Marketing Initiatives

- U S WEST will spend $200,000 to provide 1000 MegaBit modems to MegaCentral subscribers (other than U S WEST.NET) for their use in promoting their services.

- U S WEST will spend $206,000 jointly marketing and promoting MegaBit services with those ISPs that ordered MegaCentral service before December 31, 1998. U S WEST will match ISP contributions on a 2:1 basis, subject to a $6,000 limit per ISP.

- U S WEST will run six newspaper ads for MegaBit services in the two major metropolitan dailies, listing all ISPs with MegaCentral service.

Improving Communication Between U S WEST and the ISPs

- U S WEST will establish a web site to inform and update ISPs subscribing to MegaCentral service on how much MegaBit capacity is available in each of its central offices.

- U S WEST will provide data within specified time frames on the MegaBit capacity of any central office when asked by an ISP that receives MegaCentral service, if the ISP shares specified marketing forecasts with U S WEST. U S WEST is prohibited from sharing those forecasts with U S WEST.NET.

- U S WEST will keep ISPs informed on technical changes to the network affecting MegaCentral service, will share with all ISPs receiving MegaCentral service any technical information it provides to U S WEST.NET, and will provide detailed technical information to the Department upon request.

- U S WEST will not accept orders for MegaSubscriber service in new metropolitan areas until six weeks after the company has held a meeting with the ISPs in the area and until MegaCentral service has been available in the area for six weeks.

Research Requirements

- In consultation with the Department and the RUD-OAG, U S WEST will commission a survey by an independent research firm on MegaBit customers' choices of ISPs.

- U S WEST will test new MegaBit ports at a designated lab, not at U S WEST.NET, unless the lab lacks the capability to perform the test.

Reporting Requirements

- U S WEST will file quarterly reports with the Commission detailing all ISP slamming incidents.

- U S WEST will file detailed quarterly reports for the next two years on installation intervals for MegaBit and MegaBit-related services.

- U S WEST will file quarterly reports for the next two years on the number and nature of complaints from ISPs and MegaSubscriber customers on installation problems, service quality, repair problems, and marketing practices.

- U S WEST will file quarterly reports for the next two years on the number of MegaBit service orders delayed or denied due to lack of capacity or facilities.

II. The Legal Standard

The telecommunications statutes encourage parties to Commission proceedings to settle their disputes. Minn. Stat. §§ 237.076, subd. 1, 237.011 (8). The Commission is to accept a settlement "upon finding that to do so is in the public interest and is supported by substantial evidence." Minn. Stat. § 237.076, subd. 2.

III. Commission Action

A. Settlement Accepted

The Commission has examined the three settlement documents in light of the record and finds that accepting them would be in the public interest and supported by substantial evidence.

The package of forward-looking remedies negotiated by the three parties gives every promise of leveling the playing field between U S WEST.NET and other ISPs, without hindering the spread of MegaBit services and the significant network improvement they represent. The two issues deferred — U S WEST's compliance with the promotion statute and with its resale obligations — were appropriate for deferral. The first will be decided on the merits after full briefing by the parties, the second upon the emergence of a competitor presenting an actual request for resale.

The Commission is satisfied that the interests of U S WEST, the general public, and all classes of ratepayers (including Internet service providers) were well represented in this case. The Commission finds substantial evidence that U S WEST's ownership of an ISP poses inherent risks of discrimination against other ISPs and substantial evidence that the measures to which the parties have agreed will effectively counteract those risks.

The Commission finds that the settlement documents present a reasonable, forward-looking approach to the risks of discrimination inherent in U S WEST's owning an ISP. In fact, the flexibility of the settlement process has yielded an approach that is in many ways more creative, more likely to spur competition, and more likely to speed the advance of new technologies, than standard regulatory remedies. (It is unlikely, for example, that any Order coming out of the contested case would have included the joint marketing, web site communications, and network update provisions of the settlement.)

The settlement therefore not only meets the substantial evidence and public interest tests of Minn. Stat. § 237.076, but furthers several of the telecommunications policy goals set forth at Minn. Stat. § 237.011. It clearly encourages the economically efficient deployment of infrastructure for higher speed telecommunications services and greater capacity for voice, video, and data transmission. It improves quality of service, promotes customer choice, and ensures consumer protection in the transition to a competitive marketplace. Its acceptance encourages the voluntary resolution of issues between and among competing providers and discourages litigation. Minn. Stat. § 237.011 (3), (5), (6), (7), and (8).
For all these reasons, the Commission will accept the settlement, as the Administrative Law Judge recommends.

B. SIHOPE's Comments

The Commission notes that SIHOPE, the Internet service provider that intervened in the case, has seemingly withdrawn its earlier agreement not to oppose the settlement.

SIHOPE's goal in this case has always been the recovery of significant monetary damages against U S WEST. Since SIHOPE's claim, like the second complaint, rested on allegations of discrimination, the Administrative Law Judge permitted intervention, but cautioned that SIHOPE could not expand the scope of the case beyond that already established by the Commission.

The Administrative Law Judge reported that SIHOPE had agreed not to oppose the settlement, in return for U S WEST's waiver of specific defenses it might otherwise have raised in SIHOPE's civil damages action. Although at hearing SIHOPE's attorney reported receiving that waiver, SIHOPE stated it opposed the settlement for failure to make specific findings of discrimination and for failure to assess what it considered adequate monetary penalties.

Setting aside the issue of SIHOPE's ability to repudiate its earlier agreement, the Commission finds that the relief SIHOPE seeks is beyond the scope of this case, beyond the Commission's jurisdiction, and in no way jeopardized by the Commission's acceptance of this settlement. This settlement leaves SIHOPE free to sue U S WEST in district court, the appropriate forum for the individualized determination and imposition of civil damages SIHOPE seeks. (It also gives SIHOPE the added benefit of defense waivers by U S WEST.)

Not only does the Commission lack institutional expertise in calculating business damages, it appears to have no authority to award them. The Commission's focus is systemic; its charge is to protect and promote the broad public interest. It is not designed or empowered to resolve commercial disputes. The courts, on the other hand, are designed and empowered for that very purpose, and they are the proper forum for SIHOPE's claims.

Since SIHOPE's opposition to the settlement in grounded in a quest for relief the Commission cannot grant, its opposition, even if valid following its earlier assent, does not preclude acceptance of the settlement.

C. Mr. Baker's Comments

Richard Baker, an attorney and a MegaSubscriber customer who was not a party to the case, spoke in opposition to the settlement. Mr. Baker raised two claims: (1) that the technical process of providing MegaBit service effectively "slams" MegaBit subscribers from state-regulated local service to an unregulated hybrid service, raising issues of privacy, consumer protection, and state authority; and (2) that on at least two occasions, U S WEST has billed customers for MegaBit services before those services were up and running.
Neither of these claims is decided by the settlement, and the Department and U S WEST have assured the Commission that these issues are under discussion by the parties. The Commission concludes that Mr. Baker's concerns do not undermine the public interest or substantial evidence bases for accepting the settlement.

D. Conclusion

The three settlement agreements are in the public interest and are supported by substantial evidence. They will be accepted.

ORDER

1. The Commission accepts the three settlement agreements jointly submitted by U S WEST Communications, Inc., the Department of Public Service, and the Residential Utilities Division of the Office of the Attorney General.

2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

APPENDIX K

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of U S WEST Communications, Inc.'s Proposed Revisions to Termination Liability Assessments

ISSUE DATE: October 13, 1998

DOCKET NO. P-421/EM-98-769

ORDER REJECTING TARIFF/PRICE LIST REVISIONS, CLARIFYING PRACTICAL EFFECT OF FILING, AND STAYING IMPLEMENTATION OF FUTURE TARIFF/PRICE LIST REVISIONS

PROCEDURAL HISTORY

On June 1, 1998 U S WEST Communications, Inc. (U S WEST) filed tariff and price list revisions imposing termination charges on contract customers choosing to substitute a reseller for U S WEST as the provider of contract services. The company made the filing eleven days after the Commission issued an Order in a complaint proceeding finding that existing company tariffs and price lists did not permit it to impose such charges.[1]

On June 15, 1998 the Department of Public Service (the Department) filed comments supporting the tariff/price list revisions.

On June 24, 1998 InfoTel Communications, LLC (InfoTel), the complainant in the earlier proceeding, filed comments opposing the tariff/price list revisions.

On July 13, 1998 U S WEST filed reply comments.

On September 29, 1998 the matter came before the Commission.

[1] In the Matter of a Complaint by InfoTel Communications, LLC v. U S WEST Communications, Inc. Concerning Resale of Contract Services, Docket No. P-421/C-98-10, ORDER CONSTRUING TARIFFS AND PROHIBITING TERMINATION CHARGES IN RESALE CONTEXT (May 21, 1998).

FINDINGS AND CONCLUSIONS

I. Introduction and Background

A. The Contracts at Issue

The contracts at issue involve specialized telecommunications services which the customer agrees to purchase for a specific length of time in exchange for a discounted price. Contracts run from three to ten years -- the longer the term, the steeper the discount. The contracts require termination fees of 15% to 40% of the minimum cost of completing the contract if the customer stops taking service before the end of the term.

B. U S WEST's Resale Obligations

Under state and federal law U S WEST is required to permit competitors to interconnect with its network on competitive and non-discriminatory terms and to permit competitors to purchase its services at wholesale and sell them at retail. 47 U.S.C. § 252(c); Minn. Stat. § 237.16. Both state and federal law prohibit U S WEST from imposing unreasonable or discriminatory restrictions or limitations on such resale. 47 U.S.C. § 251(b)(1); Minn. Stat. § 237.121 (a) (5).
U S WEST and InfoTel have entered into an interconnection and resale agreement, in which the parties agree that InfoTel may purchase essentially all of U S WEST's services for resale at a wholesale discount of 21.5% below U S WEST's retail prices. The 21.5% wholesale discount was set by the Commission in an earlier proceeding; it represents, as required by federal law, the retail rate minus any marketing, billing, collection, and other costs that will be avoided by selling wholesale instead of retail. 47 U.S.C. § 252(d)(3).)

In the interconnection and resale agreement, U S WEST agrees to provide wholesale to InfoTel all telecommunications services it currently provides, "including contract service arrangements." U S WEST also agrees to obey all federal and state laws regarding its resale obligations, to remove from its tariffs any provisions not in compliance with those obligations, and to refrain from imposing unreasonable or discriminatory conditions or limitations on InfoTel's resale of its services.

II. Positions of the Parties

A. InfoTel

InfoTel maintained that the services being provided by U S WEST under these term discount contracts are telecommunications services and are therefore subject to the resale requirements of state and federal law, as well as the resale provisions of the parties' interconnection and resale agreement.

The company claimed there is no practical, legal, or public policy justification for preventing the resale of these services -- preventing resale results in higher prices for consumers and has no financial effect on U S WEST, which makes the same profit either way. (As a matter of law, the wholesale rate is presumed to equal the retail price, minus costs incurred solely for retail purposes.)

InfoTel claimed that U S WEST's refusal to permit the resale of services already being provided under contract was stifling competition. The company filed an affidavit essentially showing that it succeeded in attracting new customers when termination charges did not apply and failed in attracting new customers when they did apply.

The company also argued that alleged features of U S WEST's term contracts -- excessively high termination charges, excessively long terms, automatic renewal provisions, failure to mention competitive options -- were anti-competitive and, in the case of excessive termination charges, commercially unreasonable.

B. U S WEST

U S WEST denied that existing contractual arrangements were telecommunications services subject to resale requirements and claimed that what InfoTel sought was more properly characterized as the involuntary assignment of ongoing contracts. This, the company said, was improper as a matter of public policy and constitutional law.

The company emphasized that InfoTel could purchase wholesale the same discounted term service packages at issue, it just could not step into term service packages already in operation without its customers incurring termination charges. The company stated that permitting InfoTel to take U S WEST's place in existing term contracts would drive up prices, since the company would have no incentive to keep offering term discount packages.

Finally, U S WEST claimed that having to accept the wholesale discount for services provided under existing term contracts might keep it from recovering costs, since it incurs significant marketing and capital costs at the beginning of each contract term, which can only be recovered by completion of the contract.

C. The Department

The Department argued that the unfinished or unexpired portion of a term contract is not a "telecommunications service" and is therefore not subject to state and federal resale requirements.

The Department also argued that permitting resellers to displace incumbents on existing term contracts could drive incumbents out of the term contract market, since they could never make the lowest offer. This in turn would drive up costs to consumers.

The Department pointed to practical difficulties in enforcing different standards vis-a-vis termination charges for customers choosing a first reseller, a subsequent reseller, or a facilities-based carrier. Finally, the Department stated that prohibiting termination charges only in the resale context could put facilities-based carriers at such a severe disadvantage as to inhibit the growth of facilities-based competition.

III. Commission Action

A. Summary of Commission Action

The Commission agrees with the Company and the Department that the unexpired portions of term contracts for telecommunications services are not "telecommunications services" and are not subject to the resale requirements of federal law, state law, or the U S WEST/InfoTel interconnection agreement.

The Commission finds that the tariff/price list revisions at issue are unreasonably broad, are anti-competitive in function and effect, and constitute unreasonable restrictions on resale. The Commission will reject the tariff/price list revisions as not just and reasonable and as violating the resale requirements of state and federal law.

The Commission will clarify that the tariff/price list revisions, which went into effect by operation of law, apply only to customers who terminated contracts between the dates they went into effect[2] and the date of the hearing at which the Commission rejected them.[3]

To minimize uncertainty and disruption in the marketplace, the Commission will stay implementation of all future tariff or price list filings containing termination liability assessment provisions, pending action on such filings by the Commission.

These actions are explained below.

B. Ongoing Contracts Are Not Telecommunications Services Subject to Resale Requirements

The Commission agrees with U S WEST and the Department that the unfinished terms of ongoing contracts are not "telecommunications services" and are therefore not subject to the resale requirements of state and federal law. Telecommunications services and contract rights to provide telecommunications services are two different things.

It is *services* that U S WEST must provide for resale, not ongoing contractual relationships with actual customers. The federal Act makes this clear at 47 U.S.C. § 251(c)(4), where it defines incumbents' resale duties as being

> **(A)** to offer for resale at wholesale rates <u>any telecommunications service that the carrier provides at retail</u> to subscribers who are not telecommunications carriers; and
>
> **(B)** not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on the resale of <u>such telecommunications service</u> . . .
> 47 U.S.C. § 251(c)(4), emphasis added.

---

[2] June 11, 1998 for price lists; June 21, 1998 for tariffs.

[3] September 29, 1998.

U S WEST is required to offer to InfoTel at the wholesale rate every telecommunications service it offers at retail, including packages of services offered under contract at discounted prices for specified lengths of time.[4] Since U S WEST does not offer the uncompleted portions of such contracts at retail, however, it is not required to offer them to InfoTel at wholesale.

To hold otherwise would not only contravene the statutory language, it could end term discounts and the price advantages they bring consumers. Even more seriously, it could undermine the stability of contractual relationships, on which much of our commercial life depends. For these reasons, even if the statutory language were ambiguous, the Commission would find it difficult to conclude it permitted resellers to step into existing contracts between incumbents and their retail customers. Since the statutory language is clear, however, it is unnecessary to reach the underlying policy issues.

C. The Commission's Historical Treatment of Termination Charges

Termination charges have been a conundrum since local competition began. On the one hand, the Commission has long believed that contracts, the standard vehicle for defining buyer/seller relationships, will play a major role in any competitive telecommunications market. Since contracts carry consequences for buyers or sellers who renege, reasonable termination charges may be part of a truly competitive environment.

At the same time, the Commission has been concerned that contracts, if permitted too early in the development of competitive markets, could inhibit competition. As the Commission explained in a May 1996 Order rejecting three to five year contracts with termination charges of 15% to 25%:

> The rate stability plan clearly gives U S WEST an unearned competitive advantage over other companies which may wish to enter the SingleNumber Service market. [footnote omitted] It permits the Company to capture market share now, before effective local exchange competition has been realized, by offering discounted prices, and to retain market share later, as competitive forces evolve, by enforcing exit penalties in the long term contracts required to get the discounted prices. This marketing strategy and its resulting competitive advantage are available to U S WEST only because it is currently the monopoly provider.
>
> To allow U S WEST or any other incumbent provider to exploit its monopoly status and throw up eleventh hour barriers to customers changing companies would directly contravene state and federal policies opening the local telecommunications market to competition. It would complicate, prolong, and perhaps jeopardize the already complex process of transforming a monopoly environment into an effectively competitive one. It would be unfair to competitors, who cannot yet extract long term commitments in return for rate reductions.
> Once effective competition has developed, U S WEST and other local companies will presumably be free to offer discounts in return for term commitments. This is common practice in other industries -- it has even been permitted in some earlier U

[4] These are the "contract services" or "contract service arrangements," referred to in the interconnection agreement and the rules of the Federal Communications Commission, cited by InfoTel.

S WEST filings, where inhibiting competition was not an issue and assuring a stable revenue stream was. At this point, however, when competitors are poised to enter the market for the first time, it is critical that consumer choice be unrestrained and that it be unmistakably clear that the local market will indeed be opened to vigorous competition on terms that favor no one but the consumer.

In the Matter of U S WEST Communications, Inc's Proposal to Offer a Rate Stability Plan for SingleNumber Service, Docket No. P-421/EM-95-1245, ORDER REJECTING RATE STABILITY PLAN (May 7, 1996).

In March 1997 the Commission found that the competitive market had evolved to the point that it was now reasonable to permit U S WEST to offer contracts for specialized services lasting from three to seven years and containing termination charges of 15% to 30%. The Commission believed the federal Telecommunications Act of 1996 had effectively opened the market to competition and that permitting business customers to buy telecommunications services by contract, the way they bought other services, would speed competition. In the Matter of a Request by US WEST Communications, Inc. for Authority to Introduce a Rate Stability Plan for the Service Configuration Element of ISDN Primary Rate Service, Docket No. P-421/EM-96-1419, ORDER APPROVING PETITION (March 20, 1997).

The Order emphasized that no one had opposed the contracts at issue and that the Commission retained the right and duty to intervene on behalf of the public interest if necessary. It is now necessary, as explained below.

D. The Termination Charges At Issue Are Not Just and Reasonable and Unreasonably Restrict Resale

U S WEST filed these tariff/price list revisions under Minn. Stat. §§ 237.63 (tariffs) and 237.60 (price lists). Both sections require the company to demonstrate that its proposal is just and reasonable. The termination charges at issue fail this test.

Despite the Commission's earlier optimism, it is now clear that the competitive market has not yet evolved to the point that long term contracts with significant termination charges are anything but barriers to competition, at least in the resale context. InfoTel has submitted evidence essentially showing that it succeeded in attracting new customers when termination charges did not apply and failed when termination charges did apply. The company stated that long term contracts with significant termination charges were a primary, if not the primary, obstacle to its gaining a foothold in the marketplace.

There is nothing in the record to suggest that InfoTel's experience is unique among resellers. In fact, there is reason to believe that resellers, facing myriad start-up costs, often lack the resources to mount the kind of extended legal or regulatory challenge necessary to invalidate excessive termination charges or other unreasonable contract terms.

While the Commission may have been right in believing that contracts could encourage competition by permitting business customers to use familiar procurement methods to buy telecommunications services, the length of these contracts (up to 10 years) and the size of their termination charges (up to 40%) have eliminated any pro-competitive effect they might have had. They do, as the Commission originally feared, "lock up" the market at a time when consumer options ought to be burgeoning.

Furthermore, the automatic renewal provisions of these contracts can lock up small or inattentive customers beyond the original contract term, compounding their anti-competitive effect. The contracts' failure to identify the services contracted for as competitive, or to otherwise signal the existence of competitive alternatives, can also confuse or mislead less sophisticated customers.

In short, these contracts, at least as applied to resale customers, function as barriers to competition at this stage in the development of the competitive market. They therefore fail the "just and reasonable" standard of Minn. Stat. §§ 237.60 and 237.63. They also unduly and unreasonably restrict the resale of contract service arrangements, in violation of Minn. Stat. § 237.121 (a) (5) and 47 U.S.C. § 251(b)(1).

For all these reasons, the tariff/price list revisions will be stricken.

E. The Practical Consequences of U S WEST's Filing

The tariff/price list revisions proposed by U S WEST went into effect by operation of law on June 11, 1998 for price lists and June 21, 1998 for tariffs. Minn. Stat. §§ 237.60; 237.63. The Commission clarifies that they were in effect from those dates until the date of the hearing at which the Commission found them invalid[5] and that they apply only to customers who terminated contracts under qualifying conditions during that time period.

F. Implementation of Future Tariff/Price List Filings Containing Termination Charges Stayed

For competition to succeed, the rules of engagement must be clear, fair, and predictable. The Commission cannot subject consumers and resellers to the daily possibility that U S WEST will file new tariff/price list revisions with termination charges that go into effect in 10 or 20 days, let alone the possibility that multiple tariff/price list revisions will be filed and rejected, as the company works its way toward just and reasonable contract terms.

Resellers cannot carry out effective marketing if they cannot quote a price that will be effective for more than 10 days. Consumers cannot trust the emerging competitive market if their liability for termination charges can vary widely from day to day.

The Commission will therefore stay implementation of future tariff/price list revisions containing termination charges until the Commission has reviewed and acted upon them.

The Commission will so order.

ORDER

[5] September 29, 1998.

1. The tariff/price list revisions filed by U S WEST Communications, Inc. regarding termination liability assessments are hereby rejected.

2. The Commission clarifies that the tariff/price list revisions discussed herein were effective from June 11, 1998 for price lists and June 21, 1998 for tariffs until September 29, 1998, when the Commission disapproved them. They apply only to customers who terminated contracts under qualifying conditions during that period.

3. Within 10 days of the date of this Order, U S WEST shall make a tariff filing clarifying that the tariff/price list revisions at issue have been stricken and clarifying their effective dates as set forth in ordering paragraph 2.

4. Implementation of all future U S WEST tariff/price list revisions containing termination liability assessments is hereby stayed pending Commission review and action on such revisions. The filing required under ordering paragraph 3 is excepted from this requirement.

5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of U S WEST Communications, Inc.'s Proposed Revisions to Termination Liability Assessments

ISSUE DATE: February 4, 1999

DOCKET NO. P-421/EM-98-769

ORDER DENYING RECONSIDERATION

PROCEDURAL HISTORY

On October 13, 1998 the Commission issued its ORDER REJECTING TARIFF/PRICE LIST REVISIONS, CLARIFYING PRACTICAL EFFECT OF FILING, AND STAYING IMPLEMENTATION OF FUTURE TARIFF/PRICE LIST REVISIONS. Among other things, that Order rejected tariff and price list revisions filed by U S WEST Communications, Inc. which imposed termination charges on customers choosing to substitute a reseller for U S WEST as the provider of contract services. It also stayed the implementation of future tariff/price list revisions imposing termination charges, pending their review by the Commission.

On October 23, 1998 U S WEST filed a motion for reconsideration, seeking reversal of the rejection of its tariff/price list revisions and removal of the stay on implementing future tariff/price list revisions.

On November 5, 1998 InfoTel Communications, LLC filed comments opposing reconsideration.

On January 26, 1999 the matter came before the Commission.

FINDINGS AND CONCLUSIONS

The Commission has reviewed the record and heard the arguments of all parties.

The Commission concludes that the motion for reconsideration does not raise new issues requiring development, does not point to new and relevant evidence, does not expose errors or ambiguities in the original Order, and does not otherwise persuade the Commission that it should rethink its original decision.

167

The Commission concludes that the original decision is the one most consistent with the facts, the law, and the public interest. The original decision will be affirmed.

ORDER

1. U S WEST Communications, Inc.'s motion for reconsideration is hereby denied.

2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

APPENDIX L

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of a Formal Complaint by the Members of the Minnesota Independent Payphone Association and Choicetel, Inc. Against U S WEST Communications, Inc. Regarding Unbundling the Network Elements of Automatic Number Identification

ISSUE DATE: February 4, 1999

DOCKET NO. P-421/C-98-786

ORDER GRANTING RELIEF, REQUIRING APPLICATION OF WHOLESALE DISCOUNT TO PAL SERVICE, AND LIMITING SERVICE TO PAYPHONE PROVIDERS TO PAL SERVICE

PROCEDURAL HISTORY

On June 9, 1998 the members of the Minnesota Independent Payphone Association (MIPA) and Choicetel, Inc., a competitive local exchange carrier, filed a complaint claiming that U S WEST Communications, Inc. was violating a Commission Order by refusing to unbundle the network elements making up Automatic Number Identification service.[1] The Complaint requested the following relief:

(1) an Order requiring U S WEST to unbundle and offer on a tariffed basis ANI ii 70, a code identifying a phone line as a payphone line; and

(2) an Order requiring U S WEST to refund to MIPA members and Choicetel the difference between their rates following unbundling and the rates they are currently paying; or

(3) in the alternative, an Order requiring U S WEST to offer Public Access Line service, a service which includes ANI ii 70, for resale at the wholesale discount set by the Commission in arbitration proceedings under the federal Telecommunications Act of 1996, 47 U.S.C. § 252.

---

[1] The Order cited was In the Matter of a Formal Complaint of the Members of MIPA Against U S WEST Communications, Inc, Docket No. P-421/C-95-1036, ORDER REQUIRING PROVISION OF 1FB TO COCOT PROVIDERS FOR RESALE AND THE RETENTION AND UNBUNDLING OF PAL (November 27, 1996).

On July 6, 1998 the Commission issued an Order requiring U S WEST to answer the Complaint.

On July 17, 1998 U S WEST filed an answer to the complaint and a motion to dismiss, claiming the United States Congress, acting through the Federal Communications Commission (FCC), has preempted any state action to require the unbundling of ANI ii 70.

On July 25, 1998 complainants filed a reply disputing U S WEST's claims and claiming that the unbundling requested would improve 911 service to persons using payphones.

On September 18, 1998 the Department of Public Service filed comments recommending that the Commission order U S WEST to unbundle ANI ii 70 service.

On the same date the Metropolitan 911 Board filed comments asking the Commission, in connection with any relief granted in this case, to require U S WEST to transmit a code identifying payphones as payphones to 911 operators.

On October 30 and November 5, 1998 U S WEST filed final comments. On November 16 and 17, 1998 complainants and the Metropolitan 911 Board, respectively, filed final comments.

On January 12, 1999 the matter came before the Commission.

FINDINGS AND CONCLUSIONS

I. Factual Background

In November of 1996 the Commission issued the Order MIPA claims U S WEST is violating. That Order required U S WEST to do two things: (1) to permit independent payphone providers to buy one-party flat-rate business service (1 FB service) for use in providing public payphone service, and (2) to unbundle and offer at tariffed rates the constituent elements of Public Access Line (PAL) service, the comprehensive payphone service which includes everything from a single-party line to the screening, identification, and blocking codes necessary for billing, collection, and fraud prevention in payphone service.[2]

Prior to the November 1996 Order, PAL service had been the only U S WEST service independent payphone providers could legally use to provide public payphone service. MIPA sought the right to use 1 FB service, which could be combined with payphone-specific service elements provided by the payphone owner, U S WEST, or another vendor. For most payphone providers, using PAL service was substantially more expensive than using 1 FB service, even with the cost of purchasing payphone-specific service elements separately.

In the November 1996 Order the Commission found that the state local competition statute and the

[2] In the Matter of a Formal Complaint of the Members of MIPA Against U S WEST Communications, Inc, Docket No. P-421/C-95-1036, ORDER REQUIRING PROVISION OF 1FB TO COCOT PROVIDERS FOR RESALE AND THE RETENTION AND UNBUNDLING OF PAL (November 27, 1996).

federal Telecommunications Act of 1996 prohibited U S WEST from refusing to permit resale of its one-party flat-rate business service and from refusing to unbundle the components of PAL service. Minn. Stat. § 237.121; 47 U.S.C. § 251.

Following the November 1996 Order, most payphone providers in U S WEST's service area converted from PAL service to 1 FB service, often buying one or more unbundled PAL service elements from U S WEST. U S WEST reduced the price of PAL service to compete with 1 FB, but 1 FB continued to hold a slight price advantage because, unlike PAL, it could be purchased from resellers at a discount. It therefore remained the dominant payphone service.

In March 1998 the landscape changed, when the FCC adopted a nation-wide compensation plan to promote competition in the payphone industry.[3] The FCC plan established a uniform code -- ANI ii 70 -- to identify payphones to interexchange carriers when customers accessed the carriers through a payphone with a credit card. These calls were becoming a major source of payphone revenue, and it was important to standardize compensation procedures.

The FCC held that, unless the payphone transmitted the ANI ii 70 code, the interexchange carrier need not compensate the payphone owner for the call. To expedite and simplify compliance with the Order, the FCC also appeared, at least, to prohibit local exchange carriers from providing the ANI ii 70 code to any customer other than a payphone provider taking tariffed payphone service. For U S WEST, the only qualifying service is PAL.

II. The Issues and Positions of the Parties

MIPA claims the November 1996 Order requires U S WEST to unbundle ANI ii 70, as a component of PAL, and to offer it at tariffed rates. MIPA does not read the FCC Order as preempting that action and argues that such a reading conflicts with the intent of both the FCC Order and the Commission's November 1996 Order. In the alternative, MIPA states that requiring U S WEST to offer PAL for resale to competitive carriers at the wholesale discount (21.5%) applicable to other retail services would be equally appropriate relief.

The Metropolitan 911 Board reports that it considers 911 service to metropolitan payphone locations seriously degraded by the use of 1 FB lines for payphone service. Payphones using 1 FB service do not transmit PAL's payphone identification code and therefore appear as business locations in 911 data banks. This can cause confusion about the location of the emergency to which police, firefighters, or emergency medical personnel are dispatched.

U S WEST claims the Commission is preempted from unbundling ANI 70 ii and cannot require the Company to offer PAL at the wholesale discount because it is not a retail service and is already being offered at a wholesale rate. The Company states it wishes to work with the Metropolitan 911 Board to assure the most effective 911 service possible, but that operational constraints make it impossible to improve payphone identification for 1 FB lines.

---

[3] Memorandum Opinion and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket 96-128, DA 98-481 (March 9, 1998).

The Department of Public Service argues that the Commission is not preempted from unbundling ANI ii 70 and may require the Company to offer PAL at the wholesale discount.

III. Commission Action

A. Summary of Commission Action

The Commission finds that it is contrary to the public interest to continue the unbundling of PAL service mandated in the November 1996 Order. The Commission will not only not require the unbundling and tariffing of ANI ii 70, it will require U S WEST to move all independent payphone customers to PAL service within 90 days. This decision makes it unnecessary to reach the preemption issue raised by U S WEST.

The Commission also finds that PAL service is a retail service subject to resale at the wholesale discount under the Telecommunications Act of 1996. The Commission will direct U S WEST to make the service available at wholesale to authorized local resellers immediately.

These actions are explained below.

B. Independent Payphone Providers Buying Service from U S WEST Must Buy PAL Service

The Metropolitan 911 Board has made a clear, compelling, and unrefuted showing that permitting the provision of public payphone service through the use of U S WEST's one-party flat-rate business lines (1 FB lines) jeopardizes the public safety.

When emergencies are reported from payphones using 1 FB lines, no payphone code appears to the 911 dispatcher. This means that police officers, firefighters, and emergency medical technicians dispatched in response do not always know that the call came from a payphone and may lose critical minutes trying to find the caller or the emergency reported. Even worse, if the 911 caller fails to give an address, emergency personnel may be dispatched to the wrong address altogether, since the address on the 1 FB line may be the payphone provider's business address, not the location of the payphone.

None of these problems occur with PAL-equipped payphones, which transmit a "payphone" code and their exact location to the 911 dispatcher.

The Commission accepts and concurs with the judgment of the 911 Board that this situation is unacceptable. The Commission also accepts U S WEST's judgment that operational constraints make it impossible for the Company to ensure that 1 FB lines used for payphone service transmit all the information emergency dispatchers need. The only available remedy is to limit independent payphone providers using U S WEST's service to PAL service, and the Commission will so order.

C. PAL Service Must Be Offered at the Wholesale Discount

The federal Telecommunications Act of 1996 requires incumbent local exchange carriers "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. . ." 47 U.S.C. § 251 (c) (4) (A). Complainants asked for alternative relief in the form of an Order requiring U S WEST to offer PAL service at the 21.5% wholesale discount applicable to 1 FB service in the Choicetel/ U S WEST interconnection agreement.

U S WEST opposed that course of action, arguing that PAL is not a retail service but a wholesale service and is already being offered at wholesale rates. The Company also argued that the Commission has approved negotiated interconnection agreements classifying PAL as exempt from the resale requirements of the Act.

While the Company is correct that the Commission has approved parties' negotiated agreements exempting PAL from resale at the wholesale discount, the Commission itself has not found that the Act requires such treatment. In fact, when the Commission has faced the issue directly with other companies, it has found that PAL is a retail service subject to resale at the wholesale rate. In the first and most complex GTE arbitration proceeding, for example, the Commission found as follows:

> GTE claimed its COCOT [customer owned coin operated telephone] rates were already wholesale rates which it should not be required to discount further. The Commission agrees with the ALJ that GTE must offer these rates at the wholesale discount.
>
> The Act imposes a two-part test for services incumbent LECs must offer at wholesale. The incumbent LEC must "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. . ." 47 U.S.C. § 251 (c) (4) (A).
>
> First, COCOT services are clearly provided at retail, meeting the first prong of the statutory test. The independent pay phone provider does not resell the service it buys from GTE; it uses that service to put together a retail service of its own. COCOT services are no more wholesale services than equipment sales to independent pay phone providers are wholesale transactions. In both cases vendors are providing at retail the building blocks of another retail service.
>
> Second, COCOT subscribers are not telecommunications carriers under 47 U.S.C. § 153 (44) - (46), but aggregators under 47 U.S.C. § 226 (a) (2). COCOT services therefore meet both prongs of the statutory test and must be offered at wholesale rates to CLECs [competitive local exchange carriers].
>
> In the Matter of AT&T Communications of the Midwest, Inc.'s Petition for Arbitration with Contel of Minnesota, Inc. d/b/a GTE Minnesota under Section 252(b) of the Federal Telecommunications Act of 1996, Docket No. P-442,407/M-96-939, ORDER RESOLVING ARBITRATION ISSUES AND OPENING COST PROCEEDING (December 12, 1996) at 14.

This decision was upheld on reconsideration, when the Commission found that the largely deregulated status of payphones made no difference:

> The Commission affirms its December 12 Order for the reasons given therein. Whatever the regulatory status of these services, they are services provided at retail to subscribers who are not telecommunications carriers, making them subject to the Act's resale requirements. 47 U.S.C. § 251 (c) (4) (A). The Act contains no exception for deregulated services.
>
> ORDER RESOLVING ISSUES AFTER RECONSIDERATION AND APPROVING INTERCONNECTION AGREEMENT (March 14, 1997) at 10.

The Commission made the same findings in the later Sprint/GTE arbitration proceeding. In the Matter of Sprint Communications Company L.P.'s (Sprint's) Petition for Arbitration of with Contel of Minnesota, Inc. d/b/a/ GTE Minnesota (GTE) Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, Docket No. P-407,466/M-96-1111, ORDER RESOLVING ARBITRATION ISSUES (January 21, 1997) at 11.

For the same reasons, the Commission will require U S WEST to offer PAL service to authorized resellers at the same wholesale discount applicable to one-party flat-rate business service. U S WEST's PAL service, like the COCOT services of other carriers, is a telecommunications service provided at retail to subscribers who are not telecommunications carriers. Like the COCOT services of other carriers, it must therefore be offered for resale at the wholesale discount.

D. Conclusion

The public safety requires ending the practice of permitting independent payphone providers to provide public payphone service using U S WEST's one-party flat-rate business service. The Telecommunications Act of 1996 requires that U S WEST offer PAL service to authorized resellers at the wholesale discount.

The Commission will so order.

ORDER

1. Within 90 days of the date of this Order U S WEST Communications, Inc. shall stop providing 1 FB service to independent payphone providers planning to use it to provide public payphone service and shall restrict customers buying service for that purpose to PAL service. U S WEST shall work with independent payphone providers to prevent service disruptions and to minimize any confusion and inconvenience resulting from the change.

2. U S WEST Communications, Inc. shall begin offering PAL service for resale at the wholesale discount forthwith.

3. U S WEST Communications, Inc. shall make a filing demonstrating compliance with the terms of this Order promptly upon compliance.

4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

175

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of a Formal Complaint by the Members of the Minnesota Independent Payphone Association and Choicetel, Inc. Against U S WEST Communications, Inc. Regarding Unbundling the Network Elements of Automatic Number Identification

ISSUE DATE: August 2, 1999

DOCKET NO. P-421/C-98-786

ORDER DENYING RECONSIDERATION AND CLARIFYING EARLIER ORDER

PROCEDURAL HISTORY

On June 9, 1998 the members of the Minnesota Independent Payphone Association (MIPA) and Choicetel, Inc., a competitive local exchange carrier, filed a complaint claiming that U S WEST Communications, Inc. was violating a Commission Order by refusing to unbundle the network elements making up Automatic Number Identification service.[1] The Complaint requested the following relief:

(1) an Order requiring U S WEST to unbundle and offer on a tariffed basis ANI ii 70, a code identifying a phone line as a payphone line; and

(2) an Order requiring U S WEST to refund to MIPA members and Choicetel the difference between their rates following unbundling and the rates they are currently paying; or

(3) in the alternative, an Order requiring U S WEST to offer Public Access Line service, a service which includes ANI ii 70, for resale at the wholesale discount set by the Commission in arbitration proceedings under the federal Telecommunications Act of 1996, 47 U.S.C. § 252.

On February 4, 1999 the Commission issued an Order granting complainants the relief they had requested in the alternative -- an Order requiring U S WEST to offer its Public Access Line service at the wholesale discount applicable to the Company's other services. On public safety

[1] The Order cited was In the Matter of a Formal Complaint of the Members of MIPA Against U S WEST Communications, Inc, Docket No. P-421/C-95-1036, ORDER REQUIRING PROVISION OF 1FB TO COCOT PROVIDERS FOR RESALE AND THE RETENTION AND UNBUNDLING OF PAL (November 27, 1996).

176

grounds, the Order also required U S WEST to stop supplying one-party flat-rate business service to payphone providers for use in providing public payphone service and to substitute Public Access Line service instead.

On February 16, 1999 U S WEST filed a Motion to Reconsider, asking the Commission to do the following:

(1) reverse its decision to apply the 21.5% wholesale discount to Public Access Line service, instead applying no discount or, in the alternative, a 9.8% discount;

(2) find that any discount applicable to Public Access Line service was not available to complainants;

(3) modify the Order's requirement to restrict payphone providers to Public Access Line service by requiring payphone providers to identify payphone lines, by authorizing U S WEST to automatically convert lines it knows to be payphone lines, and by explicitly noting that U S WEST will no longer provide one-party flat-rate service for use in providing public payphone service;

U S WEST also requested miscellaneous clarifications and corrections to the February 4 Order.

On February 24, 1999 complainants filed a petition for reconsideration of the decisions not to unbundle ANI ii 70 service and to prohibit the use of one-party flat-rate business service for payphone lines, should the Commission grant U S WEST's request to eliminate or reduce the wholesale discount on Public Access Line service. Complainants also requested two clarifications to the February 4 Order.

On April 22, 1999 the Department of Public Service filed comments recommending denying the U S WEST petition and making the two clarifications requested by complainants.

On July 27, 1999, both petitions came before the Commission. At that time U S WEST stated it did not oppose the two clarifications requested by complainants.

FINDINGS AND CONCLUSIONS

The Commission finds that U S WEST's motion to reconsider does not raise significant new issues, point to new and relevant evidence, expose errors or ambiguities in the original Order, or otherwise persuade the Commission that it should rethink its original decision. The Commission concludes that the original decision is the one most consistent with the facts, the law, and the public interest. The original decision will be affirmed.

Since the original decision will be affirmed, complainants' reconsideration request is moot. The Commission will, however, make the two clarifications that were requested by complainants, concurred in by the Department of Public Service, and unopposed by U S WEST.

The Commission will clarify that the 90-day deadline in ordering paragraph one of the February 4 Order will run from the date of this Order, not from the date of the original Order. The parties have correctly pointed out that changes of this magnitude normally occur after any reconsideration petitions have been addressed.

The Commission will also clarify that the prohibition against providing one-party flat-rate business service for use in public payphones applies not just to independent payphone providers, but to U S WEST's payphone division as well. Clearly, permitting any payphone provider to use one-party flat-rate business service would raise all the public safety issues the original Order was intended to resolve. Although the U S WEST payphone division currently uses only Public Access Line service, practices change over time, and the safest course is to clarify that this practice must continue.

The Commission will so order.

ORDER

1. The Motion to Reconsider filed by U S WEST Communications, Inc. is hereby denied.

2. Ordering paragraph one of the February 4 Order is hereby amended to read as follows:

   Within 90 days of the date of this Order or the Order resolving any request(s) for reconsideration filed in this case, whichever is later, U S WEST Communications shall stop providing 1 FB service to independent payphone providers planning to use it to provide public payphone service and shall restrict customers buying service for that purpose to PAL service. U S WEST shall use only PAL service in its own payphone operations. U S WEST shall work with independent payphone providers to prevent service disruptions and to minimize any confusion and inconvenience resulting from the change.

3. In all other respects, the February 4 Order is affirmed.

4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

179

APPENDIX M

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of a Complaint by First Call Communications Against US WEST Communications, Inc. Regarding Installation and Order Change Procedures

ISSUE DATE: July 6, 1998

DOCKET NO. P-421/C-98-909

ORDER REQUIRING ANSWER TO COMPLAINT AND ESTABLISHING TIME FRAMES

PROCEDURAL HISTORY

On May 19, 1998 First Call Communications, a customer premises equipment vendor, filed a complaint alleging that U S WEST Communications, Inc., an incumbent local exchange carrier, frequently failed to connect First Call's customers with the public network and to install special features and advanced services promptly and reliably. The complaint alleged that one customer, Richfield Lutheran Church, had lost its long-time telephone number, been disconnected for several days, lost voice mail service, and lost "hunting"[1] capability after First Call installed new equipment.

First Call asked the Commission to take action to ensure better service to First Call's clients.

On June 30, 1998 the matter came before the Commission.

FINDINGS AND CONCLUSIONS

I. The Issues

Under Commission rules, respondents do not have to answer complaints until the Commission finds that it has jurisdiction over them and that there are reasonable grounds to investigate. Minn. Rules, part 7829.1800, subp. 1. If the Commission makes those two findings, it serves the complaint on the respondent, requires an answer, and handles the case under the formal complaint procedures of Minn. Rules, part 7829.1800 *et seq.*

The threshold issues are therefore whether the Commission has jurisdiction over U S WEST and the conduct alleged, and if so, whether those allegations merit investigation.

---

[1]"Hunting" is the term used to describe the ability to switch calls from a busy line to an open one.

180

II. Commission Action

The Commission finds that it has jurisdiction over this matter. Minn. Stat. § 237.081 requires and authorizes the Commission to resolve complaints against telephone companies and to investigate whenever it believes any telephone service may be inadequate. Minn. Stat. §§ 216A.05 and 237.081 require and authorize the Commission to enforce the telecommunications statutes, including the requirement that all companies provide reasonably adequate service.[2] Clearly, the Commission has jurisdiction over First Call's claims.

The Commission also finds that there are reasonable grounds to investigate First Call's allegations. The Commission has a duty to ensure reasonably adequate telephone service to every ratepayer. If the facts alleged are true, there may be significant service quality problems requiring Commission attention. First Call's allegations clearly merit investigation.

The Commission will therefore serve the complaint on U S WEST and require an answer. Because of the need to resolve issues affecting service quality as quickly as is consistent with fair and thoughtful decision-making, the Commission will act under Minn. Rules, part 7829.3100 to shorten the time frame for answering this complaint and will require complainants and other interested parties to respond to that answer within ten days.

The Commission will so order.

ORDER

1. Within 10 days of the date of this Order, U S WEST Communications, Inc. shall file an answer to the attached complaint, complying with the service requirements of Minn. Rules, part 7829.1800.

2. Within 10 days of the filing of the answer, complainants and any other parties wishing to comment shall file replies.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (612) 297-4596 (voice), (612) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

[2]Minn. Stat. § 237.06.

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of a Complaint by First Call Communications against US WEST Communications, Inc. Regarding Installation and Order Change Procedures

ISSUE DATE: August 12, 1998

DOCKET NO. P-421/C-98-909

ORDER STAYING PROCEEDING

PROCEDURAL HISTORY

On May 19, 1998, First Call Communications, a customer premises equipment vendor, filed a complaint alleging that US WEST Communications, Inc., an incumbent local exchange carrier, frequently failed to connect First Call's customers with the public network and to install special features and advanced services promptly and reliably.

On July 6, 1998, the Commission issued its ORDER REQUIRING ANSWER TO COMPLAINT AND ESTABLISHING TIME FRAMES. In that Order, the Commission found that it has jurisdiction over the claims alleged in the complaint and that there are reasonable grounds to investigate First Call's allegations. The Commission served the complaint upon US WEST and required the company to file an answer to the complaint within ten days.

On July 16, 1998, First Call and US WEST filed a Stipulation and Joint Motion to Stay Proceedings. In the stipulation the parties stated that they had engaged in discussions regarding First Call's alleged service problems. In an attempt to resolve the situation, US WEST recommended that First Call obtain service through a "single point of contact" at US WEST's Agent Vendor Services Center, and gave First Call the names and telephone numbers of supervisory personnel at the Center. First Call agreed that, on a trial basis, it would obtain service in the manner recommended by US WEST.

The stipulating parties asked the Commission to stay the proceeding until October 14, 1998. During that time, First Call will evaluate the service provided by US WEST under their new arrangement. On or about October 14, First Call will decide if it should continue to pursue its complaint or if it should withdraw the complaint. First Call agreed to notify the Commission and US WEST of its intentions regarding the complaint by October 14, 1998.

The parties asked the Commission to issue an Order staying the proceeding until October 14, 1998, and providing that, notwithstanding the July 6, 1998 Order, US WEST will not be required to answer First Call's complaint unless and until US WEST is later ordered to do so by the Commission.

On August 4, 1998, the matter came before the Commission for consideration.

182

FINDINGS AND CONCLUSIONS

The parties to this complaint proceeding are working together to resolve the service issues raised by First Call. The parties agree that the Commission proceeding should be stayed until the parties have had sufficient time to determine if they can resolve their issues or if First Call will continue to pursue Commission action.

No other party commented on or objected to the parties' proposal. The short delay in addressing this complaint is justified, given the prospect of achieving a mutually agreeable resolution without further administrative involvement.

The Commission will accept the parties' Stipulation and Joint Motion to Stay Proceedings, stay the proceeding until October 14, 1998, and lift US WEST's obligation to answer the May 19, 1998 complaint until such time, if any, as the Commission further orders US WEST to file an answer.

ORDER

1. The Commission accept the parties' Stipulation and Joint Motion to Stay Proceedings.

2 The Commission stays the proceeding until October 14, 1998.

3. The Commission lifts US WEST's obligation to answer the May 19, 1998 complaint until such time, if any, as the Commission further orders US WEST to file an answer.

4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (612) 297-4596 (voice), (612) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

APPENDIX N

SPECIAL NOTICE AND ORDER
ADMINISTRATIVE APPROVAL OF PETITION TO WITHDRAW FILING

In the Matter of AT&T and Sprint's Petition for a Commission Order Requiring the Release of All IntraLATA Toll Carrier "Freezes" Instituted Without Prior Customer Authorization	DATE:	July 15, 1999
	DOCKET NO.	P-442, 466/EM-99-616

Pursuant to Minn. Stat. § 237.02 and 47 U.S.C. § 258(a), AT&T Communications of the Midwest, Inc. (AT&T) and Sprint Communication Company, L.P. (Sprint) submitted a Petition on May 3, 1999. Together, they request a Commission (MNPUC) order requiring that US West Communications, Inc. (US West), and any other intraLATA toll carrier engaged in a similar practice, release all intraLATA toll carrier freezes that the carrier has instituted without the prior authorization of the respective customers. Because the request for an order alleges anti-competitive violations of rules and orders, (Petition at ¶¶ 9-16), Minn. Rules 7829.1800 applies.

On July 7, 1999 AT&T and Sprint filed a Joint Motion for Dismissal with Prejudice.

PLEASE TAKE NOTICE that the Minnesota Public Utilities Commission has delegated to its Executive Secretary the authority to issue orders on the Commission's behalf approving the withdrawal of filings under the following circumstances:

1. Where the party initiating the filing with the Commission requests that the filing be withdrawn; and

2. Where no person, including the Department of Public Service or Office of Attorney General, has expressed any opposition to the withdrawal of the filing; and

3. Where there is no indication from any Commissioner or Staff assigned to that filing of any reasons that the matter should not be withdrawn.

Based on the review by Commission Staff, the above named petitioner's request for Dismissal with Prejudice under this docket, satisfies the above noted criteria. Therefore, this request for Dismissal with Prejudice is hereby approved.

This information can be made available in an alternate format (i.e., large print or tape) by calling 651/297-4596 (voice), or 651/297-1200 (TDD/TTY), or 1-800-627-3529 (TTY relay service).

BY THE COMMISSION

Burl W. Haar
Executive Secretary

184

PUC WORKING COPY

AT&T (4)

Michel L. Singer
Attorney

Room 1575
1875 Lawrence Street
Denver, CO 80202
303 298-6527

July 6, 1999

Comm.
AG
Carol
Diane
Mark
Laury

Via Overnight Delivery

RECEIVED
JUL - 7 99
MINNESOTA PUBLIC UTILITIES COMMISSION

Dr. Burl Haar
Executive Secretary
Minnesota Public Utilities Commission
121 - 7th Place East, Suite 350
St. Paul, MN 55101

Re: AT&T and Sprint's Petition for a Commission Order Requiring the Release of All IntraLATA Toll Carrier "Freezes" Instituted Without Prior Customer Authorization, Docket No. P-442, 466/EM-99-616

Dear Dr. Haar:

Enclosed for filing in the above-referenced matter are an original and fifteen copies of AT&T and Sprint's Joint Motion for Dismissal With Prejudice.

Please file-stamp the additional enclosed copy of the Motion and return it to me in the self-addressed stamped envelope.

Please call me if you have any questions regarding this filing.

Sincerely,

Michel L. Singer

MLS/jb

Enclosures

cc: Service List

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshal Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

PETITION OF AT&T COMMUNICATIONS OF THE MIDWEST, INC. AND SPRINT COMMUNICATIONS COMPANY, L.P. FOR A COMMISSION ORDER REQUIRING THE RELEASE OF ALL INTRALATA TOLL CARRIER "FREEZES" INSTITUTED WITHOUT PRIOR CUSTOMER AUTHORIZATION	Docket No. P-442, 466/EM-99-616

JOINT MOTION FOR DISMISSAL WITH PREJUDICE

AT&T Communications of the Midwest, Inc. and Sprint Communications Company, L.P. (collectively the "Petitioners") hereby submit this Joint Motion for Dismissal with Prejudice. The Petitioners request that the Commission dismiss the Petition filed herein, for the following reasons:

1. The introduction of intraLATA toll dialing parity and the changes in the Federal Communications Commission's slamming rules have created new and difficult issues for state commissions and carriers alike.

2. Where possible, it is in the interest of their respective customers and the public generally for carriers to cooperatively resolve the issues raised in this Petition and other pending jamming and slamming proceedings in other jurisdictions.

3. In an effort to achieve the goal of cooperation, the Petitioners and U S WEST have come to a mutually acceptable agreement under which they have resolved the disputes between them arising under this Petition.

4. Notwithstanding this dismissal, however, the Petitioners will continue to advocate their respective positions in rulemakings and other proceedings such that this Commission will have an opportunity to address any issues raised independent of this Petition. Thus, the Commission will have ample opportunity to consider the issues raised herein in the context of other proceedings.

5. Dismissing this proceeding will not harm the public interest and will only maintain the status quo.

For the foregoing reasons, the Petitioners request that the Commission dismiss this Petition with prejudice such that no party to this proceeding will re-file this Petition at a later time.

RESPECTFULLY submitted this 6th day of July, 1999.

AT&T COMMUNICATIONS OF
THE MIDWEST, INC.

By: ______________________
Maria Arias-Chapleau
Letty S.D. Friesen
Michel L. Singer
1875 Lawrence Street, Suite 1500
Denver, Colorado 80202
Telephone: 303-298-6475
Facsimile: 303-298-6301
E-mail: lsfriesen@lga.att.com

SPRINT COMMUNICATIONS
COMPANY, L.P.

Donald Low
8140 Ward Parkway, 5-E
Kansas City, MO 64114
Telephone: (913) 624-6865
Facsimile: (913) 624-5681
E-mail: don.a.low@mail.sprint.com

AFFIDAVIT OF SERVICE

STATE OF COLORADO)
)ss.
COUNTY OF DENVER)

Janet Browne, being first duly sworn, deposes and says that on this 6th day of July, 1999, she served the foregoing to the:

ATTACHED SERVICE LIST

by placing true and correct copies thereof in envelopes and depositing the same, with Federal Express, for overnight delivery, as designated in the Service List.

Janet Browne

Janet Browne

Subscribed and sworn to before me
this 6th day of July, 1999.

JANET R. JENSEN
NOTARY PUBLIC
STATE OF COLORADO

Janet R. Jensen

Notary Public
My Commission Expires: 7/8/2000

APPENDIX O

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner

In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against U S WEST Communications, Inc. Regarding Access Service

ISSUE DATE: August 15, 2000

DOCKET NO. P-421/C-99-1183

ORDER FINDING JURISDICTION, REJECTING CLAIMS FOR RELIEF, AND OPENING INVESTIGATION

PROCEDURAL HISTORY

On August 18, 1999, AT&T Communications of the Midwest, Inc. (AT&T) filed a complaint under Minn. Stat. § 237.462 claiming that U S WEST Communications, Inc. (U S WEST) was providing inadequate access services to AT&T and was discriminating against AT&T both in providing access services and in building and maintaining the infrastructure necessary to support them. The complaint sought specific remedial action and asked the Commission to conduct an expedited proceeding under Minn. Stat. § 237.462, subd 6, instead of contested case proceedings.

On September 2, 1999, U S WEST filed an answer denying AT&T's claims and opposing an expedited proceeding. The company also filed a Motion for a More Definite Statement and to Strike AT&T's claims, challenging the Commission's jurisdiction over the case.

On September 20, 1999 the Commission issued an Order that denied U S WEST's motion, accepted jurisdiction for purposes of developing the issues, opened an expedited proceeding, and adopted a procedural schedule proposed by the parties. The Commission issued subsequent Orders amending the procedural schedule and resolving discovery disputes.

On November 24, 1999, U S WEST renewed its jurisdictional challenge by filing a Motion for Partial Summary Judgment and to Exclude Irrelevant Evidence. The Commission deferred the motion until the facts had been developed. The Commission held evidentiary hearings in the case on February 16 and 17 and asked the parties to address the motion for partial summary judgment in their post-hearing briefs.

On July 11, 2000 the Commission met to decide the case.

FINDINGS AND CONCLUSIONS

I. Factual Background

"Access services" are services that enable long distance carriers to connect with the local network and transmit long distance calls to and from subscribers. There are two kinds of access services - "dedicated access," which uses a direct and exclusive link between a subscriber and a long distance carrier, and "switched access," which uses the public switching network.

Dedicated access services normally include the use of the local loop and trunking facilities. Switched access services normally include the use of the local loop, local switches, interoffice facilities, and, depending upon individual needs, tandem switches and supporting capabilities such as signaling systems.

When long distance traffic exceeds the carrying capacity of these facilities, long distance calls are blocked. When existing trunking facilities are inadequate, requests for additional access services are deferred or denied. AT&T claimed that call blocking and denial of dedicated access had become so common that U S WEST's access services no longer met statutory standards of reasonableness and adequacy.

II. AT&T's Complaint

A. Factual Claims

AT&T claimed a pattern of inadequate and discriminatory service, based on the following factual allegations:

(1) U S WEST is failing to build and maintain the infrastructure necessary to provide adequate access services to AT&T and its customers;
(2) U S WEST discriminates against AT&T and its customers and in favor of itself, its affiliates, and their customers, as it builds, maintains, and deploys infrastructure;
(3) U S WEST shares with its operating divisions and affiliates information it refuses to share with AT&T regarding which sections of its network are at or near full capacity and which sections will be upgraded in the near term;
(4) U S WEST impedes the economic development of those communities whose access facilities it fails or refuses to upgrade;
(5) U S WEST invests disproportionately in facilities to serve its retail customers, to the detriment of its wholesale customers;

B. Legal Claims

AT&T claimed that U S WEST's actions violate the following Minnesota statutes:

(1) Minn. Stat. § 237.06, requiring reasonably adequate service and facilities;
(2) Minn. Stat. § 237.12, requiring local exchange carriers to permit physical connections with toll carriers for reasonable compensation;

(3) Minn. Stat. § 237.121(a)(2), prohibiting all carriers from intentionally impairing the speed, quality, or efficiency of services provided to consumers under tariffs;
(4) Minn. Stat. § 237.121(a)(4), prohibiting carriers from refusing to provide a service in accordance with its tariffs, price lists, contracts, or Commission rules or orders;
(5) Minn. Stat. § 237.09, prohibiting discrimination in the provision of services to end-users or other carriers.

C. Relief Sought

AT&T sought a Commission Order requiring U S WEST to take the following actions:

(1) Immediately fill all outstanding orders for access services submitted by AT&T;
(2) Report monthly to the Commission and to AT&T on all outstanding, unfilled orders for access services submitted by AT&T, with plans for filling those orders within 30 days;
(3) Report monthly to the Commission and to AT&T on U S WEST's performance in filling orders for access services submitted by AT&T, with plans for remedying any deficiencies;
(4) Report monthly to the Commission and to AT&T on U S WEST's performance in filling orders for access services submitted by other interexchange carriers, by U S WEST itself, and by U S WEST's affiliates;
(5) Respond to AT&T forecasts of future access service needs within two weeks of receipt by notifying AT&T and the Commission of any areas in which access services will be delayed or denied, and by providing a plan to remedy the situation;
(6) File monthly reports identifying any areas in which access or interoffice facilities will not be available over the next twelve months and a plan to remedy the situation;
(7) Pay any applicable damages, fines, or other remedies available under any applicable law.

III. Positions of U S WEST and the Department of Commerce

U S WEST denied that its access services were inadequate, denied that it discriminated against AT&T or any other carrier, and denied that its access services failed to meet statutory standards or tariff requirements. The company also claimed that this Commission had no jurisdiction over most of the access services at issue in the complaint.

On the jurisdictional issue, the Department of Commerce (the Department) urged the Commission to find jurisdiction over all claims in the complaint.

On the merits, the Department contended that AT&T had proved two statutory violations – failure to provide reasonably adequate service and facilities under Minn. Stat. § 237.06 and refusal to provide a service in accordance with tariffs under Minn. Stat. § 237.121(a)(4). The agency recommended establishing tariff-based, remedial deadlines for U S WEST's processing of AT&T orders for access services.

Although the Department considered the remainder of AT&T's claims unproved, the agency believed that AT&T had submitted enough evidence to warrant concern and to justify further monitoring. The agency submitted a list of detailed monthly reporting requirements which it urged the Commission to impose for at least the next six months.

Finally, the agency recommended that the Commission examine the need for a rulemaking to establish wholesale access service quality standards on a state-wide, industry-wide basis.

IV. Summary of Commission Action

The Commission will deny U S WEST's motion for partial summary judgment, finding that it has jurisdiction over the quality of intrastate access services whether provided under state or federal tariffs. The Commission will therefore consider all service orders involving intrastate traffic placed in evidence by AT&T.

The Commission finds that the record does not demonstrate that U S WEST is failing to provide access services in conformity with its tariffs, does not demonstrate that U S WEST is failing to provide reasonably adequate access services and facilities as required by statute, and does not demonstrate that U S WEST is discriminating against AT&T or any other carrier in its provision of access services. AT&T's allegations have not been proved by a preponderance of the evidence, and the Commission will not grant the substantive relief requested by AT&T and the Department.

At the same time, however, the Commission finds that the record does contain enough evidence of substandard service, missed tariff deadlines, and disparate treatment of retail and wholesale customers, to warrant concern and to justify further monitoring. The Commission will therefore open an investigation into whether it should develop access service quality standards for U S WEST and, if so, what standards would be appropriate. This investigation will be consolidated with the ongoing investigation into U S WEST's wholesale service quality, since both investigations involve similar facilities, many of the same parties, and similar issues.

Finally, to ensure an adequate record for informed decision-making, the Commission will require U S WEST to file, and to serve on AT&T and the Department, monthly reports containing the access service quality information identified as essential by the Department.

These decisions will be explained in turn.

V. The Commission Has Jurisdiction Over the Quality of Intrastate Access Services, Whether Provided Under State or Federal Tariffs

A. The Issue

AT&T claims that the quality of U S WEST's access services, measured largely in terms of how long it takes to install new service, has deteriorated to the point that AT&T can no longer provide reasonably adequate long distance service within the State of Minnesota. AT&T also claims that U S WEST discriminates against AT&T and in favor of itself and its affiliates in the provision of access services.

To prove its case, AT&T introduced hundreds of access service orders, developed "snapshots" showing the status of pending orders as of specific dates, and produced extensive data, both raw and extrapolated, on historical intervals between order dates and service dates.

U S WEST attempted to exclude most of this evidence on grounds that the intrastate services at issue had been ordered under federal tariffs, which it claimed deprived this Commission of any jurisdiction over their quality. (Because FCC rules classify facilities whose traffic is more than 10% interstate as interstate facilities, most access facilities are interstate facilities whose services are subject to federal tariffs.)

U S WEST made three arguments in support of its claim that this Commission did not have, or should not exercise, jurisdiction over U S WEST's intrastate access service quality: (1) Congress, acting through the Federal Communications Commission (FCC), has preempted state regulation of intrastate access service quality; (2) the filed rate doctrine prohibits the Commission from exercising authority over the quality of intrastate services offered under a federal tariff; and (3) even if the Commission has jurisdiction over the quality of these services, it should defer to the FCC under the doctrine of primary jurisdiction.

AT&T and the Department of Commerce disagreed, as does the Commission. Each argument will be examined in turn.

B. Congress has not preempted state regulation of intrastate access service quality

Since 1934, telecommunications services have been subject to both state and federal regulation, with the general rule being that the FCC regulates interstate service and the states regulate intrastate service. Since the same equipment, facilities, and personnel usually provide both interstate and intrastate service, however, jurisdictional issues have often been complex.

In this case, for example, most of the access facilities involved are "mixed use" facilities, providing both interstate and intrastate services. They are classified as interstate facilities, however, because, under FCC cost allocation rules, facilities that carry more than 10% interstate traffic must be classified as interstate, with their services federally tariffed.[1] The issue here is whether that cost allocation rule, which clearly preempts state authority to require state tariffs, also preempts state authority over the quality of these intrastate services. The Commission finds that it does not.

The United States Supreme Court has articulated a fact-intensive test for determining whether preemption has occurred in the telecommunications context:

> The Supremacy Clause of Art. VI of the constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, . . . when there is outright or actual conflict between federal and state law, . . . where compliance with both federal and state law is in effect physically impossible, . . . where there

[1] 47 C.F.R. § 36.154.

is implicit in federal law a barrier to state regulation, . . . where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, . . . or where the state law stands as an obstacle to accomplishment and execution of the full objectives of Congress. . . . [2]

None of the preemption conditions described by the Court pertains here.

1. No clear expression of Congressional intent to preempt state law

Congress has not expressed a clear intent to preempt state authority over intrastate access service quality. There is nothing in title 47 stating, or even suggesting, that intrastate service quality has become an exclusively federal concern. In fact, the opposite is true.

First, Congress has long been at pains to make it clear that the FCC shares jurisdiction over the nation's telecommunications network with the states. Because reliable, affordable telecommunications are critical to the well-being of both the states and the nation, these services have long been subject to both state and federal regulation. Since 1934, the Telecommunications Act has contained some version of the current 47 U.S.C. § 152 (b), which states

> . . . nothing in this chapter shall be construed to apply or to give the [Federal Communications] Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service . . .

Dual jurisdiction has long been the rule in the telecommunications arena. Further, the Telecommunications Act of 1996 expressly preserves state authority to regulate access services for purposes of furthering competition. That is exactly the issue here, where AT&T claims competition is being undermined by the poor quality of U S WEST's wholesale access services and by discrimination in their provision.

> Additional State Requirements. Nothing in this part precludes a state from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or *exchange access*, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.
>
> 47 U.S.C. § 261 (c), emphasis added.

Finally, the Telecommunications Act of 1996 recognizes the importance of state oversight of intrastate services – including service quality – as telecommunications markets move from the monopolistic model to the competitive one:

---

[2] *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 368-69 (1986) *(citations omitted)*; *Chicago & N.W. Transport Company v. Kalo Brick and Tile Company*, 450 U.S. 311 (1980).

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, *ensure the continued quality of telecommunications services*, and safeguard the rights of consumers.

47 U.S.C. § 253 (b), emphasis added.

For all these reasons, the Commission concludes that neither Congress nor the FCC has expressed a clear intent to preempt state authority over intrastate access service quality.

2. No outright or actual conflict between federal and state law

There are no federal statutes or regulations establishing wholesale access service quality standards. There is therefore no federal law with which any intrastate service quality directive of this Commission could conflict. Neither is there any federal statute or regulation exempting carriers from complying with intrastate access service quality standards imposed by state regulatory authorities.

The Commission concludes that there is no outright or actual conflict between federal and state law vis-a-vis intrastate access service quality.

3. Compliance not physically impossible; no implicit barrier to state regulation

Since there are no federal wholesale access service quality standards, no service quality remedy imposed by this Commission could put U S WEST in the position of being physically unable to comply with both state and federal law. Neither is there any implicit barrier in federal law to this Commission exercising authority over intrastate access service quality.

4. Congress has not occupied the field; action by this Commission not an obstacle to federal objectives

Neither Congress nor the FCC has undertaken the kind of comprehensive regulation of telecommunications service quality that would suggest or demonstrate an intent to "occupy the field" of intrastate access service quality. In fact, quite the opposite – the statute is at pains to emphasize the continuing role of the states in ensuring service quality.

Similarly, it is implausible to suppose that any action taken by this Commission to remedy defects in U S WEST's intrastate access service quality would in any way stand as an obstacle to the accomplishment and execution of the full objectives of Congress or the FCC.

5. Conclusion

Careful examination of the facts of this case and the doctrine of preemption compels the conclusion that neither Congress nor the FCC has preempted this Commission's authority over the quality of U S WEST's intrastate access services.

C. The Filed Rate Doctrine does not apply

1. The Issue

a. The Filed Rate Doctrine in General

U S WEST claims that the filed rate doctrine prohibits this Commission from requiring its intrastate access service to meet basic service quality requirements, because those requirements are not set forth in its federal tariff. The Department and AT&T disagree, as does the Commission.

The filed rate doctrine is the longstanding regulatory principle that common carriers are bound by the terms of their tariffs; they cannot make side agreements with individual customers, and any side agreements they do make will be stricken. *Black's Law Dictionary*[3] defines the filed rate doctrine in this way:

> **Filed rate doctrine.** Doctrine which forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority.

The doctrine was and is central to the regulatory compact. The monopoly carrier providing essential services gives up the right to set its own rates in return for a guaranteed opportunity to recover its expenses and earn a fair rate of return through uniform, tariffed rates. The public gives up the right to bargain with the carrier over rates in return for predictable, fair and reasonable, and non-discriminatory rates.

If the carrier is not bound by the tariffed rates, however, the regulatory compact falls apart. Customers who lack the bargaining power to make side agreements with the carrier may be forced to subsidize those who have the bargaining power to make those agreements. They may even be forced to pay higher-than-tariffed rates to receive equivalent service. For this reason, regulatory agencies and courts have long viewed the filed rate doctrine as vital to the integrity of the regulatory process and have enforced it vigorously.

In 1998 the United States Supreme Court confirmed the doctrine's continuing vitality, in a case brought against AT&T by Central Office Telephone, Inc., a bulk purchaser and reseller of telecommunications services. Central Office believed that AT&T had promised - and failed to deliver - billing, provisioning, and service options not reflected in its tariffs. Central Office sued, claiming breach of contract and tortious interference with its contractual relations with its customers.

The Supreme Court held for AT&T, finding that the filed rate doctrine invalidated any agreement to provide services not described in the tariffs and any agreement to provide services under conditions or time lines different from those prescribed in the tariffs. The Court emphasized that the filed rate doctrine was grounded in the principle of anti-discrimination:

---

[3] *Black's Law Dictionary,* sixth edition.

. . . . This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to *prevent unjust discrimination*.

* * * * * * * *

While the filed-rate doctrine may seem harsh in some circumstances, its strict application is necessary to "prevent carriers from intentionally 'misquoting' rates to shippers as a means of offering them rebates or discounts," the very evil the filing requirement seeks to prevent. . . . Regardless of the carrier's motive – whether it seeks to benefit or harm a particular customer – the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same service. *It is that anti-discriminatory policy which lies at "the heart of the common-carrier section of the Communications Act."*[4]

b. Commission Action

U S WEST cites several cases in which federal courts reject individual customers' claims against common carriers under state contract and tort law, emphasizing that a common carrier's relationship with its customers is governed by its tariff. The company argues that any attempt by this Commission to regulate the quality of federally tariffed intrastate access services would violate the filed rate doctrine, by imposing impermissible extra-tariff requirements on a common carrier. The Commission disagrees.

As discussed above, the purpose of the filed rate doctrine is to preserve the integrity of the regulatory compact by prohibiting side agreements between common carriers and their customers, not to define state regulatory authority over common carriers. All cases cited by U S WEST deal with individual customers raising state law claims against common carriers; none deal with a state regulatory agency attempting to exercise its jurisdiction over intrastate service.

The jurisdictional issue in this case does not turn on the filed rate doctrine - which touches indirectly on federal/state relationships while speaking directly to customer/carrier relationships - but on the doctrine of preemption, which speaks directly to federal/state jurisdictional boundaries. Of course, the Commission has already examined AT&T's claims in light of the law of preemption and has determined that its jurisdiction over intrastate access service quality has not been preempted.

Finally, it is important to note that the filed rate doctrine does not federalize every aspect of the relationship between common carriers and their customers, as Chief Justice Rehnquist noted in his concurring opinion in the *Central Office* case:

The tariff does not govern, however, the entirety of the relationship between the common carrier and its customers. For example, it does not affect whatever duties state law might impose on a petitioner to refrain from intentionally

---

[4] American Telephone and Telegraph v. Central Office Telephone, Inc., 118 S. Ct. 1956, 1962 (1998), emphasis added, citations omitted.

> interfering with respondent's relationships with its customers *by means other than failing to honor unenforceable side agreements*, or to refrain from engaging in slander or libel, or to satisfy other contractual obligations. The filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff. *It does not serve as a shield against all actions based in state law.*[5]

In short, the filed rate doctrine governs carrier/customer relationships for purposes of preventing discrimination. It prohibits AT&T and U S WEST from agreeing that U S WEST will give AT&T higher-quality service than other customers; it does not prohibit this Commission from requiring U S WEST to provide the same high quality of service to all customers of intrastate access services.

The filed rate doctrine does not invalidate agency actions that are otherwise valid under the Supremacy Clause of the Constitution and Title 47. It is not a back-door method of altering the federal/state jurisdictional boundaries which have been evolving under the federal Telecommunications Act since 1934.

For all these reasons, the Commission concludes that the filed rate doctrine does not preclude its jurisdiction over AT&T's claims.

D. The Doctrine of Primary Jurisdiction does not apply

1. The Issue

U S WEST points out that AT&T has filed complaints similar to this one in four other states and urges the Commission to decline to exercise any jurisdiction it might have, under the doctrine of primary jurisdiction. The company argues that primary jurisdiction lies with the FCC, because individual state determinations on these complaints would entail a risk of forum shopping and inconsistent decisions. The Company notes that the Colorado state commission took this position and declined to act on AT&T's complaint despite a finding that it had jurisdiction.

The Department and AT&T disagree, as does the Commission.

2. Commission Action

Primary jurisdiction is not technically a jurisdictional doctrine, but a principle of judicial self-restraint. Courts acting in accord with the doctrine defer to administrative agencies - at least for initial decision-making - issues peculiarly within the agencies' expertise.[6] Primary jurisdiction speaks to relations between courts and administrative agencies, not to relations between administrative agencies. The Commission concludes that the doctrine of primary jurisdiction does not compel, or even support, deferring this complaint to the FCC.

---

[5] Central Office at 1963, emphasis added.

[6] *Black's Law Dictionary*, sixth edition.

This is not to say that the Commission would *never* decline to take jurisdiction over an issue that could also be heard by another state or federal agency; administrative efficiency is an important goal which is sometimes best served by deferring an issue to another agency. The issue of intrastate access service quality, however, is too intensely local and critically important to defer. Minnesota businesses and households depend upon this Commission to ensure that they have working long distance service at all times. The Commission cannot responsibly defer this responsibility to another agency.

Finally, the claims that the Commission should defer to the FCC to discourage forum-shopping and prevent inconsistent adjudications of AT&T's five complaints are not persuasive. It is not forum-shopping to ask a state commission to enforce its state's telecommunications statutes; it is simply choosing an appropriate forum for that claim.

Neither is it cause for consternation that different state commissions may reach different conclusions about AT&T's claims. The possibility of different decisions in different states is the natural result of different factual situations in different states. It is also a foreseeable consequence of providing, in more than one state, an intensely local, essential service for which state and federal agencies share regulatory responsibility.

For all these reasons, the Commission concludes that it need not and should not decline to take jurisdiction over AT&T's complaint under the doctrine of primary jurisdiction.

VI. AT&T Has Failed to Prove Statutory or Tariff Violations by U S WEST

A. Positions of the Parties

1. AT&T

AT&T claimed that the record demonstrated a consistent and pervasive pattern of unreasonable delay by U S WEST in filling AT&T orders for wholesale access services. To prove its case the company introduced hundreds of access service orders, developed "snapshots" showing the status of pending orders as of specific dates, and produced extensive data, both raw and extrapolated, on historical intervals between order dates and service dates.

The company claimed these delays violated U S WEST's state and federal tariffs and state laws requiring reasonable and adequate service, requiring local exchange carriers to interconnect with toll carriers, prohibiting carriers from intentionally impairing the quality of services to consumers, and prohibiting carriers from refusing to provide any service it was lawfully obligated to provide.

AT&T also claimed that the record showed that U S WEST discriminated against AT&T in at least two ways: (1) by installing access services more quickly for retail customers than wholesale customers; and (2) by investing disproportionately in wire centers with high retail growth, as opposed to high wholesale growth.

2. The Department of Commerce

The Department of Commerce believed that, while there was some evidence in the record to support AT&T's discrimination claims, the company had failed to prove these claims by a preponderance of the evidence. The Department reached the same conclusion about AT&T's claim of inadequate investment in the infrastructure, although here, too, the agency found some support for the claim in the record. In both cases the Department recommended careful monitoring of these issues, including monthly reporting requirements designed to expose any discriminatory behavior or unreasonable investment decisions.

The agency considered the remaining adequacy of service claim a closer call, but finally concluded that AT&T had proved this claim by a preponderance of the evidence:

> AT&T failed to provide specific evidence of U S WEST's timeliness vis-a-vis the tariff deadlines for several reasons. First, AT&T's exhibits sometimes aggregated the results of all 14 states in U S WEST's service territory and sometimes contained nation-wide results. Second, AT&T's data on timely service provision consistently failed to separate orders in which facilities were available from orders in which facilities were not available. Tr. Vol. 2-A at 448 (Wilson). This omission is significant because the SIG [Service Interval Guide] imposes the five-to-nine day installation deadlines only when facilities are in place for the order.
>
> Nevertheless, AT&T provided sufficient evidence of a pattern of untimely and inadequate service by U S WEST to conclude that the percentage of missed orders under the tariff must be unreasonably high. . . .
>
> Initial Post-Hearing Brief of the Department of Commerce, p. 20.

3. U S WEST

U S WEST denied providing inadequate service, denied failing to comply with its tariffs, denied discriminating against AT&T or any other carrier, denied that it had ever refused to provide any service it was lawfully required to provide, and denied that the any of AT&T's claims had been proved by a preponderance of the evidence.

The company pointed out that its tariffs prescribed consequences for failing to meet tariff time lines (forfeiting installation charges), which suggested that the tariff anticipated something less than 100% on-time performance. The company emphasized that no one had claimed that it had failed to waive installation charges for customers whose service was installed after tariff time lines.

The company introduced evidence which it claimed showed that AT&T caused at least as many delays in installing access services as U S WEST, by submitting incomplete orders and by being unprepared to accept service when U S WEST was prepared to install it.

Finally, U S WEST claimed that AT&T's data on installation intervals was unreliable and non-probative for several reasons:

(1) at many points it failed to distinguish between service orders involving existing facilities and service orders requiring new facilities;

(2) it often failed to separate Minnesota-specific data from data for U S WEST's entire 14-state service area;

(3) it sometimes included installation intervals for projects that everyone agreed would be performed on a flexible schedule, distorting the statistical averages.

B. Commission Action

The Commission finds that AT&T has failed to prove any of its claims by a preponderance of the evidence.

1. The Inadequate Service Claim

While the data introduced to support the inadequate service claim was suggestive, it did not meet the preponderance of the evidence standard. To find service inadequate under that standard, the Commission would need less ambiguous, Minnesota-specific data pointing to pervasive and significant service quality defects. That is something this record lacks.

Little of the data presented in this case was Minnesota-specific. Much was system-wide, dealing with access services in all 14 U S WEST states; some was even nation-wide. Much of it failed to distinguish between interstate and intrastate services. Furthermore, even if the Commission had been willing to extrapolate from system-wide data to reach conclusions about Minnesota service quality, flaws in the data itself made relying on it imprudent.

Many of the statistical averages for installation intervals, for example, were based on service order data which included orders that everyone agreed would be done on a time-available basis, seriously distorting outcomes. Even worse, data on installation intervals consistently failed to distinguish between service orders involving existing facilities and service orders requiring new facilities. Since only orders involving existing facilities are subject to established installation interval guidelines, including other orders in the mix made conclusions about on-time performance wholly unreliable.

For all these reasons, the Commission finds that AT&T's claims of inadequate service have not been proved by a preponderance of the evidence.

2. The Discrimination Claims

The discrimination claims, too, have some support in the record but fail to reach the preponderance of the evidence standard. Most of the evidence filed in support of these claims was anecdotal. (That which was not anecdotal, but statistical, suffered from the same defects discussed above.)

To support its discrimination claim AT&T pointed to one Minnesota incident involving access services and one Iowa incident involving local exchange services. In the Minnesota incident AT&T stated that U S WEST deferred its request for access services for a particular customer on the basis of insufficient capacity, but found sufficient capacity when the customer requested the same services at retail from U S WEST. In the Iowa incident U S WEST responded promptly to a customer's request for retail local exchange service, but had delayed responding to a competitor's request for resold local exchange service to serve the same customer.

In the Iowa case the state commission found that it was far from clear that U S WEST had intentionally discriminated against its competitor or even that its practices needed to change. The commission found only that the company had made a mistake with anti-competitive consequences and should be put on notice that future mistakes would be viewed less indulgently.[7]

Like the Iowa commission, this commission is unable to conclude from the facts of the Minnesota incident that U S WEST intentionally discriminated against AT&T in that instance, let alone that it discriminates against AT&T systematically, as AT&T claims.

Similarly, the Commission cannot find discrimination on the basis of AT&T's statements that some business customers have reportedly been promised shorter installation intervals by U S WEST's retail division than AT&T has been promised by the wholesale division for the same service. Not only are the facts surrounding these quotes vague - making it impossible to establish that all factors affecting both quotes are identical - but customers negotiating for the same service with two vendors tend to characterize each vendor's offer to the other vendor in the most advantageous terms.

While these reports from business customers may justify further investigation, they do not, by themselves or in conjunction with the other evidence offered by AT&T, support a finding of unlawful discrimination under the Minnesota Telecommunications Act.

Finally, AT&T claims that a U S WEST program ranking wire centers as gold, silver, or bronze for capital investment planning purposes was discriminatory, because projected retail growth was a significant ranking factor. AT&T claims that this improperly subordinated the needs of wholesale customers to the needs of retail customers. The company also raises public policy/equity issues, comparing the program to the illegal lending practice of redlining.

While U S WEST's decision-making process for scheduling capital improvements may warrant examination at some point, this record does not establish that U S WEST invests in infrastructure with discriminatory intent or effect. The company, after all, must have a workable analytical framework for scheduling and siting major system improvements. Retail growth is a legitimate and presumably highly predictive indicator of future need. Further, it was not the only indicator used by the company.

Finally, although AT&T claims that wire centers with high retail growth are not necessarily the same wire centers as those with high wholesale growth, the record does not establish how large the retail/wholesale disparity is or how frequently it occurs. U S WEST, on the other hand, claims that the correlation between retail and wholesale growth potential is so high that it makes little sense to distinguish between the two. And there is certainly no clear evidence in the record of disparate impact of capital investment decisions on high-wholesale-growth wire centers.

---

[7] Final Decision and Order, McLeodUSA Telecommunications Service, Inc. v. U S WEST Communications, Inc., Docket No. FCU-99-5 (February 21, 2000).

For all these reasons, the Commission concludes that this record does not establish that U S WEST has discriminated against AT&T in the provision of access services.

VII. The Record Demonstrates a Need to Open an Investigation into Whether this Commission Should Develop Wholesale Access Service Quality Standards for U S WEST

Although the evidence in this record does not compel findings of statutory or tariff violations by U S WEST, it does demonstrate a clear need for further investigation, careful monitoring, and, potentially, wholesale access service quality standards for U S WEST. Ensuring reliable, high quality long distance service between all Minnesota households and businesses is one of this Commission's highest priorities. The record in this case raises the serious possibility that the quality of U S WEST's wholesale access services may jeopardize this important goal.

The Commission will therefore open an investigation under Minn. Stat. § 237.081 to determine whether there is a need to develop wholesale access service quality standards for U S WEST. In the interests of administrative efficiency, the Commission will incorporate this investigation into the ongoing proceeding to develop wholesale service quality standards for transactions between U S WEST and Competitive Local Exchange Carriers (CLECs).[8] Most of the facilities involved in the two cases will be similar; many of the parties will be the same; the issues will be similar. It will conserve the resources of all parties to combine the two efforts.

While U S WEST has urged an industry-wide rulemaking in place of this investigation, a rulemaking seems over-broad at this point. The access service quality problems AT&T reports appear to be unique to U S WEST. AT&T states that U S WEST is the only local exchange carrier presenting these problems. The Department concurs that U S WEST is the only local exchange carrier about whose wholesale access service quality they consistently receive complaints. The Commission concludes that at this point the investigation should focus on U S WEST's wholesale access service quality; any industry-wide problems can and will be dealt with as they arise.

The Department has developed a list of detailed reporting requirements to help isolate and identify any instances or patterns of inadequate service, discriminatory behavior, or unreasonable investment decisions by U S WEST. These requirements will produce a solid factual foundation for the investigation, as well as for the development of any wholesale access service quality standards the investigation shows to be necessary. The Commission will accept the Department's recommendation to require these filings monthly for six months, evaluating at the end of that time whether they continue to be needed.

The Commission will so order.

---

[8] This proceeding, Docket No. P-421/AM-00-849, was initiated in the U S WEST/Qwest merger case, In the Matter of the Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc. and U S WEST Communications, Inc., Docket No. P-3009, 3052, 5096, 421, 3017/PA-99-1192, ORDER ACCEPTING SETTLEMENT AGREEMENTS AND APPROVING MERGER SUBJECT TO CONDITIONS (June 28, 2000).

ORDER

1. AT&T's claims for relief are denied in their entirety.

2. U S WEST's motion for partial summary judgment and to exclude irrelevant evidence is denied.

3. The Commission hereby opens an investigation into whether there is a need to develop wholesale access service quality standards for U S WEST and if so, what standards would be appropriate.

4. The Commission incorporates this investigation into the ongoing proceeding to set wholesale service quality standards for U S WEST in its transactions with CLECs, Docket No. P-421/AM-00-849.

5. U S WEST shall provide the information set forth below to the Commission, the Department, and AT&T on a monthly, Minnesota-specific basis, for six months from the date of this Order:

   Missed and Held Orders

   For each of three categories of service recipients (U S WEST's provision of access service to AT&T; to other wholesale customers; and to U S WEST and its affiliates), the total number of orders for DS0, DS1 and DS3 dedicated access during the reporting period. For each of the three categories of service recipients, the information below should be provided.

   a. The total number of orders for dedicated access during the reporting period, divided into situations in which (1) facilities were available, and (2) facilities were not available.

      1. For the orders in which facilities were available;

         (a) the number of the orders;
         (b) out of this number, the number of orders that were not completed by the later of the SIG interval or the CDDD;
         (c) b as a percentage of a;
         (d) out of b, the number of orders for which U S WEST was ready on time but AT&T or another carrier was not;
         (e) the number of missed orders (b less d);
         (f) for the orders in e, the average days beyond the later of the SIG interval or the CDDD;
         (g) e as a percentage of a.

      2. For the orders in which facilities were unavailable:

         (a) the number of the orders, and for each order, an identification of which facility was unavailable:

205

i) between the end user and the nearest central office;
ii) central office;
iii) interoffice;
iv) between the carrier's POP and the central office nearest the POP.
v) other

(b) out of this number, the number of orders that were not completed by the later of 45 days or the CDDD;
(c) b as a percentage of a;
(d) out of b, the number of orders for which U S WEST was ready on time but AT&T or another carrier was not;
(e) the number of missed orders (b less d);
(f) e as a percentage of a.

b. The number of held orders at the end of the reporting period, and for each order, an identification of which facility was unavailable:

1. between the end user and the nearest central office;
2. central office;
3. interoffice;
4. between the carrier's POP and the central office nearest the POP;
5. other.

c. Plans to reduce the number of held orders and missed orders.

Timely Provision of an FOC

For each of the total orders missed where facilities were available and where facilities were not available, state the number of orders for which a FOC was not returned within 48 hours of the submission of an application that is sufficiently detailed and accurate to allow U S WEST to enter the order into its system.

Availability of Facilities

Identify the areas in Minnesota service territory where U S WEST will not have sufficient facilities available in the succeeding six months to allow the installation of a special access order of three circuits or fewer.

6. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

APPENDIX P

STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION

June 27, 2001

From: Burl W. Haar *B.W.H. By M.E.O.*
Executive Secretary

Subject: Notice of Docket Closure:
Docket No. P-421/C-99-1458: In the Matter of a Request for Expedited Enforcement of Interconnection Agreement

Background

On October 13, 1999, Hutchinson Telecommunications, Inc. (HTI) filed a request with the Department of Commerce asking the Department to enforce provisions of the HTI/U S WEST interconnection agreement. HTI alleged that U S WEST had engaged in anticompetitive practices for the purpose of slowing HTI's market entry. Subsequently, the Department, HTI, and U S WEST entered discussions.

On September 26, 2000, HTI informed the Department that it had reached an acceptable resolution of its issues. Since that time the docket has been dormant.

On June 1, 2001, the Commission issued a notice requesting that interested parties comment upon whether they perceive a need to keep this docket open. Comments were to be filed by June 15, 2001. No parties filed comments.

Notice of Docket Closure

In the absence of an interest in keeping the docket open the Commission shall close the docket.

If you have any questions regarding this matter, you may contact Kevin O'Grady of the Commission staff at 612.282.2151.

This document can be made available in alternative formats (i.e., large print or audio tape) by calling 651.297.4596 (voice), 651.297.1200 (TTY), or 1.800.627.3529 (TTY relay service).

207

APPENDIX Q

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of a Complaint by Dakota Telecom, Inc. Against Qwest Corporation

ISSUE DATE: July 25, 2001

DOCKET NO. P-421/C-00-373

ORDER APPROVING SETTLEMENT

PROCEDURAL HISTORY

On March 29, 2000, Dakota Telecom, Inc. (DTI), a facilities-based competitive carrier serving in the U S WEST, now Qwest, exchanges of Luverne, Marshall and Pipestone, filed a Complaint alleging that U S WEST violated its interconnection agreement with DTI by not completing calls between DTI's customers and the exchanges that have Extended Area Service (EAS) with Pipestone, Marshall, and Luverne. DTI requested an expedited proceeding, pursuant to Minn. Stat. § 237.462, to resolve its complaint. DTI also sought temporary relief requiring U S WEST to terminate EAS calls within the entire local calling areas of Marshall, Pipestone, and Luverne.

On April 13, 2000, U S WEST filed its answer asking the Commission to dismiss the complaint and to deny the request for expedited hearing and temporary relief. U S WEST maintained that the interconnection agreement does not require U S WEST to permit DTI to interconnect and gain the benefit of U S WEST's EAS system, its prior negotiations with independent telephone companies, and its agreements with local exchanges.

On May 5, 2000, the Commission issued its ORDER GRANTING TEMPORARY RELIEF AND REFERRING FOR CONTESTED CASE HEARING and its NOTICE AND ORDER FOR HEARING.

On May 30, 2000, Administrative Law Judge (ALJ) Richard C. Luis issued a scheduling order.

On December 26, 2000, DTI filed a settlement agreement with its motion to dismiss the complaint.

208

On December 28, 2000, the ALJ filed a letter transferring jurisdiction of the contested case matter to the Commission. The ALJ recommended that the Commission approve the settlement agreement and grant DTI's motion to dismiss the complaint.

The Commission met on June 19, 2001 to consider this matter.

FINDINGS AND CONCLUSIONS

I. APPROVAL OF THE SETTLEMENT

Qwest, DTI, and the CLEC Intervenors[1] have resolved their disputes and the CLECs (DTI and the CLEC Intervenors) have agreed to withdraw the complaint under terms and conditions set forth in the parties' Settlement Agreement. The local exchange carrier (LEC) intervenors are not parties to the settlement but support it. A copy of the Settlement Agreement is attached to this Order and incorporated into this Order by reference.

No party to this proceeding, including the Department, has raised any objections to the settlement agreement. Nor does any party oppose dismissal of the complaint. The ALJ, too, recommends approval of the agreement and dismissal of the complaint.

Having reviewed the terms of the proposed settlement, the Commission finds no objection to it. Indeed the settlement appears to resolve some important issues regarding interconnectin at the local tandem, local tandem availability, and tandem functionality, thereby helping to establish an environment conducive to competition in the local service market.

Therefore, the Commission will approve the settlement pursuant to Minn. Stat. § 237.076, subd. 2 and dismiss the complaint.

II. NATURE OF THE SETTLEMENT TERMS

Parties initially disagreed on how to characterize the nature of the parties' agreement that Qwest perform certain actions regarding local tandem functionality. Specifically, they disagreed about whether their agreement amended the existing interconnection agreement between Qwest and DTI or whether it simply interpreted (clarified) obligations already existing under the parties' interconnection agreement.

---

[1] The CLEC Intervenors signing the Settlement Agreement are: Crystal Communications; HomeTown Solutions; Integra Telecom; Northstar Access; Otter Tail Telecom; Tekstar Communications; Val-Ed Joint Venture; Mainstreet Communications; Onvoy; U S Link.; and, as to their CLEC activities, Ace Telephone Company, Hutchinson Telephone Company, and Paul Bunyan Telephone Company.

This dispute arose in the context of litigating DTI's complaint. In countering DTI's complaint, Qwest took the position that the action requested by DTI was not required by terms of the parties' interconnection agreement and that, therefore, any agreement to do those things would be an amendment to the interconnection agreement. Likewise, in the context of its complaint against Qwest, DTI and the CLECs argued that these actions were already required of Qwest under terms of the interconnection agreement and that no amendment to the interconnection agreement was necessary.

Once the parties agreed on what actions Qwest would take (see Agreement) the real import of the distinction shifted to whether the actions Qwest promised to take regarding tandem functionality for DTI and the signatory CLECs would be also become available across-the-board to all CLECs.

At the hearing, there came to be general agreement on the desireability of treating the settled terms as an amendment to the Qwest-DTI interconnection agreement.

- Qwest emphasized that it intended to make the terms available to all CLECs and noted that the Settlement Agreement states that the Company agrees to apply the terms of the Agreement to all CLECs consistent with the non-discrimination requirements under federal and state law.

- The Department stressed the importance of treating the Settlement terms as amending the Qwest-DTI interconnection agreement so that any CLEC (current or future) would be able to easily select these arrangements/terms for its interconnection agreement with Qwest.

- The consortium of small CLECs, which had initially opposed viewing the settlement terms as amending the interconnection agreement, acknowledged the value of assuring that the terms would be available to all CLECs (current and future) via the pick and choose provisions of Section 252 (i) of the Federal Telecommunications Act of 1996. The consortium of small CLECs withdrew its opposition to viewing the settlement terms as amending the interconnection agreement and instead supported doing so.

The Commission has analyzed the settlement terms and finds that they require Qwest to do things that the Company was not required to do under the existing interconnection agreement. For instance, in local calling areas not currently served by an official local tandem, the Settlement Agreement requires Qwest to provide CLECs with local transit service to allow CLECs to complete EAS calls to and from the exchanges included in Commission approved EAS calling areas.

As such, the Settlement Agreement amends the interconnection agreements between Qwest and the CLECs signing the settlement agreement. The parties' interconnection agreements, as amended by the settlement terms, will be available to any CLEC requesting a copy pursuant to Section 252 (i) of the Federal Telecommunications Act.

ORDER

1. The Settlement Agreement between Qwest, DTI, and the signatory CLECs (copy attached, signature pages excluded) is approved.

2. The parties shall make their interconnection agreements, as amended by the settlement terms, available to any CLEC requesting a copy per Section 252 (i) of the Federal Telecommunications Act of 1996.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

211

Settlement Agreement

Re: In the Matter of a Complaint by Dakota Telecom, Inc. against U S WEST Communications, Inc. for violation of an approved Interconnection Agreement MPUC Docket No. P421/C-00-373

Whereas, On March 29, 2000 Dakota Telecom, Inc. ("DTI") filed a complaint against Qwest Corporation f/k/a U S WEST Communications, Inc. ("Qwest") before the Minnesota Public Utilities Commission ("Commission"), which is assigned case number P421/C-00-373 (hereinafter "Complaint").

Whereas, in the Complaint, DTI sought an order requiring Qwest to provide the necessary facilities and services to provide a local calling area which includes extended area service ("EAS") as described in the Tariff for Luverne, Marshall and Pipestone, and any other local exchanges in Minnesota where DTI provides competitive local service.

Whereas, on April 18, 2000 the Commission granted temporary relief and on May 5, 2000 and May 18, 2000 the Commission issued orders that referred the dispute to a contested case proceeding.

Whereas, on the following dates, the following parties intervened in this proceeding:

May 18, 2000	Hutchinson Telecommunications, Inc.
May 19, 2000	Crystal Communications Inc.
June 9, 2000	Minnesota Independent Coalition
June 9, 2000	Frontier Communications of Minnesota, Inc.
June 9, 2000	Media One Telecommunications Corp. of MN, Inc.
June 9, 2000	Ace Telephone Association
June 9, 2000	Hometown Solutions LLC

June 9, 2000	Hutchinson Telephone Company
June 9, 2000	Integra Telecom of Minnesota, Inc.
June 9, 2000	Mainstreet Communications, LLC
June 9, 2000	Northstar Access, LLC
June 9, 2000	Onvoy
June 9, 2000	Otter Tail Telecom, LLC
June 9, 2000	Paul Bunyan Rural Telephone Company
June 9, 2000	Tekstar Communications, Inc.
June 9, 2000	U.S. Link, Inc.
June 9, 2000	VAL-ED Joint Venture, LLP
June 9, 2000	WETEC LLC

Whereas, on the following dates, Qwest entered into temporary agreements with the following companies for the routing of EAS traffic in the following EAS calling areas pending resolution of the complaint:

May 26, 2000	Hometown Solutions, Inc.
May 26, 2000	Northstar Access
June 6, 2000	Crystal Communications, Inc, d/b/a HickoryTech

Whereas, DTI and the CLEC Intervenors will be collectively referred to as the "CLECs" in this agreement and are parties to this Settlement Agreement. The local exchange carrier Intervenors, including the Minnesota Independent Coalition, Frontier Communications of Minnesota, Inc., Hutchinson Telephone Company, and Paul Bunyan Telephone Company with respect to its independent telephone company operations, are not parties to this settlement (collectively ""LEC Intervenors"). The LEC Intervenors have indicated that they support the Settlement Agreement and believe that its terms are appropriate for all similar requests for similar services from Qwest.

Whereas, Qwest and CLECS, by means of executing this letter, hereby resolve their disputes and CLECs agree to withdraw the complaint under the following terms and conditions:

1 In those Local Calling Areas in Minnesota where CLECs operate and where Qwest has an official Local Tandem, as listed in the Local Exchange Routing Guide ("LERG"), CLECs may interconnect at the local tandem (including the Metropolitan EAS area). A current list of local tandems is attached as Exhibit A and Qwest agrees to continue the designation of those switches as local tandems during the term of this agreement, as described in paragraph 15.

2. In local calling areas not currently served by an official local tandem, Qwest will provide competitive local exchange carriers ("CLECs") with local transit service to allow CLECs to complete EAS calls to and from the exchanges included in Commission approved EAS calling areas. In the local calling areas in which Qwest has previously provided tandem functionality in an end office, Qwest will provide the service from that designated end office. A list of such end offices is attached as Exhibit B. With respect to other local calling areas, Qwest will provide the service to a requesting CLEC from a point of interconnection located at one wire center per EAS area designated by the CLEC. Qwest's agreement to carry traffic pursuant to this paragraph will be subject to the terms and conditions contained in this agreement, including, without limitation, its right to determine at its sole discretion the best routing for carrying such traffic.

3. Qwest agrees to file with the Commission the list of the end offices which provide tandem functionality as described in paragraph 2. Should there be any additions or deletions to this list, Qwest will file with the commission within 21 business days.

4. CLECs will also have the alternative of using a single point of interconnection within a LATA for carrying both local and toll traffic pursuant to attachment Exhibit C. If a CLEC elects to use the single point of interconnection alternative, the CLEC may not use the option outlined in paragraph 2.

5 In those instances where CLECs elect to use tandem switching functionality and transport in an end office to terminate local EAS traffic, they shall pay Qwest the usage rate elements established in the Interconnection Agreement. Attached as Exhibit D is a list of the usage rate elements applicable under the current interconnection agreements involving CLECs that are parties to this proceeding. Calls to CMRS providers that originate within an EAS Commission designated local calling area and terminate within the same EAS Commission designated local calling area are EAS calls for the purpose of this Agreement.

6. CLECs will be responsible for paying nonrecurring compensation of $682.80 per trunk group related to labor for switch translations required to reconfigure local end office switches to provide tandem functionality.

7. Qwest is not responsible for providing any EAS facilities outside its portion of the EAS network and CLECs are solely responsible for entering into any mutual exchange of traffic agreements with incumbent LECs, competitive LECs or wireless providers to which EAS traffic will be terminated, or from which EAS traffic will be

originated or terminated to CLECs. Qwest is not responsible for the relationship between CLECs and other terminating providers other than to provide recording services where required by the Interconnection Agreement.

8, This agreement does not address whether Qwest is entitled to compensation from an incumbent LEC for traffic originated by an incumbent LEC customer and terminated to a CLEC or other third party using Qwest transport and tandem switching facilities. All parties reserve their rights with respect to the resolution of that issue.

9. The following technical restrictions will apply to Qwest's obligation to provide local tandem functionality:

A. In the event a CLEC seeks to obtain local tandem functionality pursuant to paragraph 2, such obligations only arise for local traffic. If a CLEC desires to use Qwest's toll tandem services, it must arrange to deliver its traffic to a toll access tandem designated as such in the LERG. Neither a CLEC nor Qwest may use the routing described in paragraphs 1 or 2 for toll traffic.

B. The 512 ccs restriction found in the Interconnection Agreements (AT&T Opt In Agreements, Attachment A, Section 2.4.4; DTI Agreement, Section 6.3.2.3; Crystal/Media One Agreements Section 5.3.2.3), shall apply to the Requested Exchanges. Thus, the 512 CCS rule applies to all end offices that subtend the end office with local tandem functionality, including independent local exchange carriers (ILECs), wireless service providers, and competitive local exchange carriers. Under the 512 CCS rule CLECs and Qwest agree that the CLEC must arrange for direct trunks to any subtending end office in which there is a DS1's worth of traffic.

C. In addition to the forecasting process outlined in the Interconnection Agreement in order to assist in assuring appropriate facility provisioning, CLECs will provide their view as to the percentages of traffic to be routed by NPA,NXX and 26 code.

D. Both the CLEC and Qwest will be bound by the trunk blocking restrictions contained in applicable interconnection agreements.

E. The trunk utilization obligations set forth in the applicable interconnection agreement shall apply to this arrangement.

F. Facilities used in connection with this agreement shall be SS7 signaling compliant.

G. Qwest will only provide local tandem functionality in standalone/host end office switches. Qwest has no obligation under this agreement to provide local tandem functionality in remote office switches.

H. Qwest reserves the right to determine the most efficient routing through its network system. Any changes in Qwest routing decisions will not change the compensation provided for in this agreement, associated with distance sensitive rate elements.

I. In accordance with applicable interconnection agreements, if a tandem or an end office through which a CLEC connects pursuant to this agreement is unable to, or is forecasted to be unable to, support additional traffic loads for any period of time, the Parties will mutually agree on an end office trunking plan that will alleviate the tandem capacity shortage and ensure completion of traffic.

J. Any CLEC placing orders for local tandem functionality must have established NXX codes for each rate center consistent with industry guidelines.

10. Based on the terms of this settlement, CLECs, and Qwest (the "Parties") agree that the Complaint will be withdrawn immediately and no further action by the Commission with regard to that complaint is requested. However, the Parties agree to appear before the Commission to support approval of this agreement should the Commission so request. Further, Qwest agrees to apply the terms of this Agreement to all CLECs consistent with non-discrimination requirements under federal and state law.

11. Nothing contained herein, and no action taken by the Parties with regard to this agreement, shall be construed as an admission by any of these Parties as to liability regarding the matters herein, nor speculation as to the outcome had the matter been fully litigated before the Commission.

12 This agreement shall be construed in accordance with the laws of the State of Minnesota.

13. This agreement is the entire agreement between the Parties regarding resolution of the Complaint. Prior oral and written agreements are superceded by the agreement herein and this agreement may be modified only if agreed to in writing, signed by the Parties to this complaint.

Hometown Solutions LLC

By /S/

Date

Integra Telecom of Minnesota, Inc.

By /S/

Date

Mainstreet Communications, LLC

By /S/

Date

Northstar Access, LLC

By /S/

Date

Onvoy

By /S/

Date

Otter Tail Telecom, LLC

By /S/

Date

Paul Bunyan Rural Telephone Company

By /S/

Date

Tekstar Communications, Inc.

By /S/

Date

U. S. Link, Inc.

By /S/

Date

VAL-ED Joint Venture, LLP

By /S/

Date

WETEC LLC

By Withdrew

Date

Qwest Corporation

By /s/

Date

C:\My Documents\MNfilings\dtiEASsettlementAgr 10-19-00.doc

14. Should any provision of this agreement be deemed unenforceable, this agreement shall terminate in its entirety.

15. This agreement does not supercede any terms or conditions of the interconnection agreement between Qwest and each CLEC. Issues and disputes not specifically addressed by this Agreement shall be resolved pursuant to the terms of the interconnection agreement among the Parties. This agreement shall terminate upon the termination of the current interconnection agreement between Qwest and each CLEC.

16. This agreement may be signed in counterparts, which taken together shall constitute a single agreement.

Hutchinson Telecommunications, Inc.

By /s/

Date ______________

Crystal Communications Inc.

By /s/

Date ______________

Dakota Telecom, Inc.

By /s/

Date ______________

McLeodUSA, Incorporated

By /s/

Date ______________

Ace Telephone Association

By /s/

Date ______________

C:\My Documents\MNfilings\dtiEASsettlementAgr 10-19-00.doc

APPENDIX R

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of Qwest Corporation's Refiling of its Proposed Tariffs Regarding Termination Liability Assessments as Applied to Resale Arrangements

ISSUE DATE: October 2, 2001

DOCKET NO. P-421/AM-00-1165

ORDER REJECTING TARIFF/PRICE LIST REVISIONS

PROCEDURAL HISTORY

This is the third in a series of related cases dealing with the termination liability assessments (TLAs) that Qwest Corporation proposes to charge long-term contract customers who choose to substitute a reseller for Qwest as the provider of contract services.

The first case was a complaint proceeding. In that case a competitive local exchange carrier with extensive resale operations claimed that high TLAs charged by Qwest violated federal law, its interconnection agreement with Qwest, and the public interest. The Commission issued an Order construing Qwest's tariffs and finding that, under the tariffs' terms, TLAs did not apply when customers substituted a reseller for Qwest in extended term contracts.[1] The Company appealed this decision to the Minnesota Court of Appeals.

The Company also filed new tariff and price list revisions which explicitly imposed TLAs on customers substituting a reseller for Qwest in long-term contracts. This filing began the second case, in which the Commission ultimately rejected the TLAs at issue on grounds that they were not just and reasonable, that they functioned as barriers to competition, and that they unduly and unreasonably restricted the resale of contract service arrangements.[2] The Company appealed this decision, too, to the Minnesota Court of Appeals.

---

[1] In the Matter of a Complaint by InfoTel Communications, LLC v. U S WEST Communications, Inc. Concerning Resale of Contract Services, Docket No. P- 421/C-98-10, ORDER CONSTRUING TARIFFS AND PROHIBITING TERMINATION CHARGES IN RESALE CONTEXT (May 21, 1998).

[2] In the Matter of U S WEST Communications, Inc.'s Proposed Revisions to Termination Liability Assessments, Docket No. P-421/EM-98-769, ORDER REJECTING TARIFF/PRICE LIST REVISIONS, CLARIFYING PRACTICAL EFFECT OF FILING, AND STAYING IMPLEMENTATION OF FUTURE TARIFF/PRICE LIST REVISIONS (October 13, 1998).

On May 4, 1999 the Minnesota Court of Appeals reversed and remanded the Commission's decision in the first case. The Court rejected the Commission's finding that the original tariff language itself prohibited the application of TLAs in resale situations. The Court also found that the Commission had reasonably concluded that the purpose of the tariff was cost recovery, and the Court therefore remanded the case for specific findings on costs and other relevant factors.[3] The Court noted that the second appeal had been filed and said that "the end of this litigation does not appear to be in sight for either party."

The litigation did end shortly, however, under a stipulation signed by the parties on June 10, 1999. Under the stipulation Qwest agreed that it would

(a) file another tariff on the application of TLAs in resale situations, different from the one under appeal in the second case; and

(b) dismiss its appeal in the second case;

while the Commission agreed that it would

(a) act on the new filing by conducting an expedited proceeding under Minn. Stat. § 237.61, unless a different kind of proceeding was required by law; and

(b) either delegate the filing to a Commission subcommittee under Minn. Stat. § 216A.03, subd. 8 or designate a lead Commissioner for the filing under Minn. Stat. § 216A.03, subd. 9.

On August 17, 2000 Qwest filed its new proposed tariffs, which are at issue in this case, together with supporting documents and legal memorandum. These tariffs would impose a TLA of 17.66% of the monthly contract rate for each month the customer did not take service directly from Qwest during the first year of the contract, with that rate dropping to 9% during subsequent contract years. To qualify for these TLAs, which are lower than those that can apply outside the resale context, the reseller serving the customer must agree to buy the contract services at wholesale from Qwest for the remainder of the contract term.

The Company stated that the purpose of the TLAs was to recover the retail costs it had already incurred but not yet recovered when customers switched to resellers.

Comments opposing the proposed tariff were filed by the following parties: the Minnesota Department of Commerce; the Residential and Small Business Utilities Division of the Office of the Attorney General; Eschelon Telecom of Minnesota, Inc.; McLeodUSA Telecommunications Services, Inc.; EN-TEL Communications, LLC, Lakedale Link, Inc., WH Link, LLC, and Direct Communications, LLC, filing jointly; the Association of Communications Enterprises

---

[3] InfoTel Communications, LLC v. Minnesota Public Utilities Commission, 592 N.W.2d 880 (Minn.App. 1999), *rev denied* (July 28, 1999).

(ASCENT), formerly the Telecommunications Resellers Association; USLink, Inc.; and Firstcom, Inc.

The parties opposing the new tariffs claimed that they did not meet statutory standards of fairness, reasonableness, and non-discrimination; that they would function as barriers to competition, violating state and federal law; and that they would unduly and unreasonably restrict the resale of contract service arrangements, violating state and federal law.

On January 8, 2001, the Commission issued an Order designating Chair Scott lead Commissioner in this case and authorizing him to conduct evidentiary hearings on the issues listed below, and any related relevant issues.

(a) the amount of Qwest's unavoided costs when a retail customer taking service under a long term contract switches to a reseller buying wholesale service from Qwest;

(b) the reasonableness and likely consequences of the proposed tariff provision making resellers liable for the wholesale rate for the remainder of a customer's contract term, whether the customer completes the contract term or not;

(c) whether the TLAs proposed by Qwest constitute unreasonable restrictions on resale;

(d) whether all Qwest TLAs in a resale setting should be prohibited as anti-competitive, as unreasonable restrictions on resale, as contrary to public policy, or on any other grounds, and if so, whether this prohibition should be temporary or permanent.

Chair Scott conducted evidentiary hearings on March 26, 2001. Due to changes in circumstances and business plans, some parties had withdrawn from the case. The remaining parties were Qwest; the Minnesota Department of Commerce; the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG); and four competitive local exchange carriers, filing jointly: EN-TEL Communications, LLC, Lakedale Link, Inc., Direct Communications WH Link, LLC, and Direct Communications, Inc.

The parties filed pre-hearing and post-hearing briefs. Qwest filed a post-hearing amended proposal in response to concerns raised at the evidentiary hearing. Qwest also filed a motion for leave to file a reply memorandum and supporting affidavit, together with that motion and affidavit. The Commission granted Qwest's motion, which was unopposed, and accepted its reply filing.

The Commission met to hear arguments from the parties and to deliberate on July 24, 2001.

FINDINGS AND CONCLUSIONS

I. Introduction and Background

A. The Long-Term Contracts at Issue

This case involves long-term contracts for five product groups or groups of telecommunications services –

- PBX (Private Branch Exchange), a computerized, on-site service that routes calls within organizations with multiple telephone lines;
- Centrex, a computerized, off-site service that routes calls within organizations with multiple telephone lines;
- ISDN (Integrated Services Digital Network), a network configuration permitting the end-user to transmit voice, data, and video over a common line;
- Intrastate Private Line Service, a direct circuit or channel dedicated to connecting a specific end-user to a designated point or points;
- Advanced Communications Services, a group of highly specialized services including Frame Relay Service, ATM Cell Relay Service, MegaBit Services, and Local Area Network Switching Service.

Under these long-term contracts, customers agree to purchase a service for a specific length of time, in exchange for a discounted price. Contracts run from three to ten years -- the longer the term, the steeper the discount. And, most important for present purposes, the contracts impose TLAs if the customer stops taking service directly from Qwest before the end of the term.

B. Qwest's Resale Obligations

Under state and federal law Qwest must permit competitors to interconnect with its network on competitive and non-discriminatory terms and must permit competitors to purchase its services at wholesale and resell them at retail.[4] Both state and federal law also prohibit Qwest from imposing unreasonable or discriminatory restrictions or limitations on the resale of its wholesale services.[5]

Qwest offers the five services at issue here on a wholesale basis, both as month-to-month services and as long-term contract services. The wholesale rate is 17.66% below what Qwest charges at retail for the same month-to-month or long-term contract service.

---

[4] 47 U.S.C. § 251(c); Minn. Stat. § 237.16.

[5] 47 U.S.C. § 251(b)(1); 47 U.S.C. § 251(c)(4); Minn. Stat. § 237.121 (a)(5).

This 17.66% wholesale discount rate, which applies to all Qwest's wholesale services, was set by the Commission in an earlier proceeding. As required by federal law, it represents the percentage of retail costs (marketing, billing, collection, and other costs) that Qwest avoids when it sells a service at wholesale instead of at retail.[6]

II. Qwest's Proposal

A. The Original Proposal

The Company originally proposed a TLA of 17.66% of the monthly contract rate for each month the customer did not take service directly from Qwest during the first year of the contract term. The TLA would drop to 9% per month for subsequent contract years. These TLAs, which are lower than those assessed when a customer stops taking contract services entirely, would apply only if the reseller agreed to buy the contract services at wholesale from Qwest for the remainder of the contract term.

Qwest based its TLA calculations on the 17.66% wholesale discount set by the Commission for Qwest's wholesale services across-the-board. The Company began with the assumption that that discount accurately reflects the costs the Company normally avoids when it sells services wholesale rather than retail. The Company then stated that converting long-term retail contracts into long-term wholesale contracts is not the same as selling wholesale from the beginning, because in the conversion case the Company has already incurred retail costs – especially sales and marketing costs – which the wholesale discount properly treats as avoided.

The Company therefore used the wholesale discount as a starting point for calculating the costs it avoids when it converts long-term retail contracts to long-term wholesale contracts. It used the cost categories the Commission had used to set the wholesale discount and adjusted them to reflect the retail costs it had already incurred when contracts were converted from retail to wholesale.

The Company's cost analysis determined that, while the Company avoids 17.66% of its retail costs in pure wholesale transactions, it avoids only 4.96% of its retail costs when it converts a long-term wholesale contract to a long-term retail contract. This difference requires the Company to charge a TLA of 12.7% of the face amount of the contract to recover its costs.

The Company's cost expert explained that, instead of charging 12.7% across-the-board, the Company decided to discourage early contract terminations by charging 17.66% per month during the first year of the contract and 9% during later years. Her calculations indicated that this two-tier TLA policy would produce the 12.7% overall recovery rate her cost data supported.

[6] 47 U.S.C. § 252(d)(3).

B. The Post-Hearing Proposal

In its post-hearing brief the Company dropped its proposal to charge different TLAs for different years of the contract term and lowered its estimate of its total unavoided retail costs from 12.7% of the retail rate to 11.93% of the retail rate. The lower rate was offered in response to evidence from the RUD-OAG that the 12.7% rate failed to take into account Miscellaneous Revenues, which the Commission had taken into account in calculating the wholesale discount on which the Company based its TLA calculations. The Company emphasized that it was offering the lower rate as a compromise, not as an admission of error.

The Company also offered an additional compromise proposal in which contract customers substituting resellers for Qwest would pay the lower of the 11.93% overall TLA or a service-specific TLA, which would reflect only the retail costs not avoided for that specific service. Under this proposal, the TLAs for the five services (or groups of services) at issue would be as follows:

PBX	7.75%
Centrex	11.93%
ISDN	11.93%
Intrastate Private Line	7.07%
Advanced Communications	11.93%

The Company also urged the Commission to treat this case as a civil court would treat a breach of contract case, using the record to fashion an appropriate remedy if the Company failed to prove its entitlement to all it sought.

III. Parties' Responses

A. Department of Commerce

The Department of Commerce (the Department) urged the Commission to reject the Company's proposal on grounds that incumbents cannot charge TLAs when customers switch to resellers without violating state and federal laws prohibiting unreasonable restrictions on resale. The agency classified all TLAs as restrictions on resale, emphasized that the Federal Communications Commission has found all restrictions on resale presumptively invalid,[7] and argued that the TLAs in this case are not narrowly tailored enough to defeat the presumption of invalidity.

The Department also argued that it was not fair, reasonable, or in the public interest to permit the use of TLAs when other cost recovery methods that would not inhibit competition to the same

---

[7] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket 96-98, FCC 96-325 (rel. Aug. 8, 1996), ¶ 939.

degree were readily available. (The Department suggested higher up-front charges or higher monthly rates.)

Finally, the Department claimed that the Company's TLA calculations were conceptually flawed and empirically unsound.

B. Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG)

The RUD-OAG did not agree with the Department that TLAs were unreasonable restrictions on resale *per se*. The agency believed that the TLAs in this case, however, both imposed unreasonable restrictions on resale and failed to meet statutory standards of fairness, reasonableness, and non-discrimination.

The agency argued that the cost calculations on which Qwest based its TLAs were unsound in theory and in application, chiefly for the following reasons:

- the cost development process was driven by the Company's legal and policy staff, not its cost staff;
- Qwest's calculations were based on cost data that included both month-to-month and long-term contract customers;
- Qwest's calculations were based on costs that included the costs of marketing to persons who decided not to take long-term contract services;
- Qwest's calculations failed to credit sales commissions refunded on terminated contracts;
- Qwest failed to present evidence distinguishing its unavoided costs in the long-term contract context from its unavoided costs in the month-to-month context;
- Qwest failed to establish its actual costs and actual profit margins for long-term contract services.

The agency also contended that Qwest discriminated against resellers and their customers by imposing TLAs on customers terminating long-term contracts to take more expensive service from resellers, while waiving TLAs for customers terminating long-term contracts to take more expensive service from Qwest.

C. The EN-TEL Group

Four competitive local exchange carriers – EN-TEL Communications, LLC, Lakedale Link, Inc., Direct Communications, and WH Link, LLC – filed joint comments opposing the proposed TLAs. They stated that TLAs in this range made it impossible for them to compete for Qwest's existing long-term contract customers and threatened the viability of resale as a market entry strategy by "locking up" the lucrative long-term contract services segment of the market.

They argued that it was unduly discriminatory for Qwest to waive TLAs for customers upgrading to a more expensive Qwest service, but not for customers upgrading to a more expensive service from a reseller. Similarly, they challenged what they claimed was Qwest's practice of determining on a case-by-case basis whether it would impose TLAs on a terminating customer.

They contended that it was unfair and unreasonable for the proposed tariffs to require resellers to pay "standard" TLAs of up to 40% if their customers stopped taking service entirely.

They claimed that Qwest's cost calculations were fundamentally flawed, for the reasons given by the Department and the RUD-OAG, and because (1) Qwest's calculations failed to distinguish between marketing costs for new and renewed contracts, and (2) Qwest made no adjustments for cost savings from long-term contracts, only for cost increases.

IV. The Commission's Historical Treatment of TLAs

Long-term contracts and the TLAs that go with them have been a conundrum since local competition began. On the one hand, consumers and businesses can benefit from the significant discounts long-term contracts provide. On the other hand, consumers, businesses, and the economy as a whole may be harmed if long-term contracts act to thwart competition by "locking up" lucrative segments of the emerging market. The Commission's historical treatment of TLAs has reflected the difficulty of balancing these competing interests.

In May 1996 the Commission rejected a proposal by Qwest (then U S WEST) to offer long-term contracts with TLAs of 15% to 25%, on grounds that those contracts posed a threat to the competitive market the Commission had a duty to nurture:

> The rate stability plan clearly gives U S WEST an unearned competitive advantage over other companies which may wish to enter the SingleNumber Service market. [footnote omitted] It permits the Company to capture market share now, before effective local exchange competition has been realized, by offering discounted prices, and to retain market share later, as competitive forces evolve, by enforcing exit penalties in the long term contracts required to get the discounted prices. This marketing strategy and its resulting competitive advantage are available to U S WEST only because it is currently the monopoly provider.
>
> To allow U S WEST or any other incumbent provider to exploit its monopoly status and throw up eleventh hour barriers to customers changing companies would directly contravene state and federal policies opening the local telecommunications market to competition. It would complicate, prolong, and perhaps jeopardize the already complex process of transforming a monopoly environment into an effectively competitive one. It would be unfair to competitors, who cannot yet extract long term commitments in return for rate reductions.
>
> In the Matter of U S WEST Communications, Inc's Proposal to Offer a Rate Stability Plan for SingleNumber Service, Docket No. P-421/EM-95-1245,

ORDER REJECTING RATE STABILITY PLAN (May 7, 1996).

In March 1997 the Commission found that the competitive market had evolved to the point that it was reasonable to permit Qwest to offer long-term contracts for specialized services with TLAs of 15% to 30%.[8] The Order emphasized that no one had opposed the contracts at issue and that the Commission retained the right and duty to intervene on behalf of the public interest if necessary.

By October 1998, however, it was clear that a thriving competitive market was still a goal, not a reality, and that long-term contracts with high TLAs and other anti-competitive features were one of many factors stalling competition:

> While the Commission may have been right in believing that contracts could encourage competition by permitting business customers to use familiar procurement methods to buy telecommunications services, the length of these contracts (up to 10 years) and the size of their termination charges (up to 40%) have eliminated any pro-competitive effect they might have had. They do, as the Commission originally feared, "lock up" the market at a time when consumer options ought to be burgeoning.
>
> Furthermore, the automatic renewal provisions of these contracts can lock up small or inattentive customers beyond the original contract term, compounding their anti-competitive effect. The contracts' failure to identify the services contracted for as competitive, or to otherwise signal the existence of competitive alternatives, can also confuse or mislead less sophisticated customers.
>
> In short, these contracts, at least as applied to resale customers, function as barriers to competition at this stage in the development of the competitive market. They therefore fail the "just and reasonable" standard of Minn. Stat. §§ 237.60 and 237.63. They also unduly and unreasonably restrict the resale of contract service arrangements, in violation of Minn. Stat. § 237.121 (a) (5) and 47 U.S.C. § 251(b)(1).
>
> In the Matter of U S WEST Communications, Inc.'s Proposed Revisions to Termination Liability Assessments, Docket No. P-421/EM-98-769, ORDER REJECTING TARIFF/PRICE LIST REVISIONS, CLARIFYING PRACTICAL EFFECT OF FILING, AND STAYING IMPLEMENTATION OF FUTURE TARIFF/PRICE LIST REVISIONS (October 13, 1998) at 7.

---

[8] In the Matter of a Request by US WEST Communications, Inc. for Authority to Introduce a Rate Stability Plan for the Service Configuration Element of ISDN Primary Rate Service, Docket No. P-421/EM-96-1419, ORDER APPROVING PETITION (March 20, 1997).

V. Commission Action

(a) Introduction

For these TLAs to be approved, Qwest must prove –

(a) that they are fair and reasonable under Minn. Stat. §§ 237.06, 237.011 (2), and 237.082;
(b) that they are not unduly discriminatory under Minn. Stat. §§ 237.60; and
(c) that they do not impair competition or unreasonably restrict resale under Minn. Stat. § 237.121 (a) (5) and U.S.C. § 251(b)(1) and 47 U.S.C. § 251(c)(4).

To prove these things, Qwest must show that the proposed TLAs reflect the actual retail costs that the Company does not avoid when it converts long-term retail contracts to long-term wholesale contracts. It must show that the non-price terms of the contracts are fair, reasonable, non-discriminatory, and not likely to impair competition. It must show that any TLAs ultimately proved to be cost-justified do not contravene the public interest by impairing the development of a free and competitive market or unreasonably restricting resale.

Since the Company has failed to make these showings, the Commission must reject its TLA proposal.

B. The Company's Cost Evidence Is Flawed, Incomplete, and Untrustworthy

The threshold issue in this case is whether the TLAs proposed by the Company have a solid factual basis. The Commission finds that they do not.

As explained above, the Company used the wholesale discount as the starting point for calculating the costs it avoids when it converts long-term retail contracts to long-term wholesale contracts. It used the retail cost categories the Commission had used to set the wholesale discount and adjusted them to reflect the retail costs it had already incurred but not yet recovered when these contracts were converted from retail to wholesale.

These calculations led the Company to conclude that, while it avoids 17.66% of its retail costs in pure wholesale transactions, it avoids only 4.96% of these costs when it converts a long-term retail contract to a long-term wholesale contract.[9] The Company explained this striking disparity by stating that it incurs most of the retail costs of long-term contracts up-front, mainly in marketing costs, and especially in sales commissions.

---

[9] The Company later increased this 4.96% cost figure slightly, to reflect the "Miscellaneous Revenues" originally missing from the equation, as pointed out by the RUD-OAG.

The Commission finds that the Company's cost analysis is insufficiently accurate, detailed, and rigorous to support its TLA proposals.

One of the most serious flaws in the cost analysis is that it is not based on data specific to long-term contract services, but on aggregate data on sales and marketing costs of both month-to-month and long-term contract retail customers. There is no reasonable basis to conclude that a TLA based on this methodology will limit Qwest's recovery to unrecovered costs for long-term contract customers. Clearly, the costs of month-to month service and long-term contract service differ; if they did not, the Company could not offer the significant price discounts it offers in long-term contracts.

Using aggregate data to calculate long-term costs simply requires too much guesswork to support the precise cost calculations necessary in this case. The record provides no reliable factual basis for making precise distinctions between long-term contract and month-to-month costs. The Company's TLA claims, however, rest on those distinctions, which it uses to make adjustments in the retail cost categories used in the wholesale discount methodology.

Furthermore, using aggregate data on long-term contract and month-to-month customers means that cost differences between these two classes of customers are already reflected to some degree in the baseline numbers that are being adjusted. Without a reliable way to extract the specific costs attributable to long-term contract customers, there is a significant risk of double adjustments.

Equally concerning, all of the adjustments Qwest made to the wholesale discount cost categories favored Qwest – all of them reflected instances in which the incurred-but-unrecovered retail costs of terminated long-term contract services exceeded the retail costs of month-to-month services. None of them reflected instances in which some retail costs attributable to contract customers were lower than retail costs attributable to month-to-month customers.

There are clearly many such instances, however, since it is the economies associated with establishing long-term customer relationships that enable the Company to offer the discounted prices of long-term contracts. As EN-TEL points out, these economies would appear to include reduced costs in the areas of billing, collection, and ongoing administrative support, but in the absence of more rigorous cost studies, it is impossible to know for sure.

It also appears that Qwest failed to factor in to its TLA calculations some cases in which sales commissions on terminated contracts – its major unavoided retail cost – were refunded. Similarly, the Company failed to demonstrate that it properly accounted for the reduced marketing costs associated with contract renewals. Further, until it filed its revised, post-hearing proposal, the Company failed to demonstrate that its TLA calculations had properly accounted for the miscellaneous revenues factored into the wholesale discount. And the RUD-OAG also noted that Qwest included as non-avoided costs, the costs of marketing to potential customers who do not take the service.

The Company also failed to establish that its marketing expenses, including its sales commissions, were reasonable in amount and in their terms and conditions of payment.

In short, the accuracy and precision necessary to support a TLA proposal, with its inevitable potential for inhibiting competition, is absent here. In fact, at some points the Company's proposal loses sight of the need for cost justification altogether.

For example, Qwest's original proposal to charge higher TLAs during the first year of the contract had no cost basis and was admittedly designed to discourage customers from switching to resellers early in their contract term. Similarly, the Company filed essentially no cost evidence to support the extremely high TLAs it proposed to charge resellers whose customers terminate service entirely before the end of the contract term.

Further, the Company's post-hearing alternative proposal to dramatically reduce the TLAs for two of the five services – significantly reducing its total TLA collections – casts doubt on the precision of its original proposal, which was presumably designed only to recover total unavoided retail costs.

C. The Proposed TLAs Are Not Fair and Reasonable, are Anti-Competitive, and Unreasonably Restrict Resale

For the reasons explained above, the Commission finds that the Company's cost evidence is not detailed, accurate, or reliable enough to support a finding that the proposed TLAs constitute just and reasonable rates, which the Commission must ensure under Minn. Stat. §§ 237.06, 237.011 (2), and 237.082. The Commission rejects them on that basis.

The Commission also rejects them as unreasonably restricting resale under Minn. Stat. § 237.121 (a) (5) and 47 U.S.C. § 251(b)(1) and (c)(4). Resale is a critical market entry tool for new competitors and a critical network completion tool for established competitors. Unconstrained resale is essential to the development of a competitive local telecommunications market. For this reason, federal law makes all restrictions on resale presumptively invalid.[10]

Similarly, federal law imposes more stringent resale requirements on incumbents than other local exchange carriers (including the duty to sell at cost-based wholesale rates), because it is the incumbents' networks that must be opened for competition to succeed.[11] Qwest's affidavit detailing the TLAs charged by its non-incumbent competitors therefore has little if any bearing on the reasonableness of its own TLAs.

---

[10] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket 96-98, FCC 96-325 (rel. Aug. 8, 1996), ¶ 939.

[11] 47 U.S.C. § 251(c)(4).

Any tariff affecting resale therefore triggers the highest level of scrutiny from this Commission. Here, the lack of detailed and credible cost support for the proposed TLAs, which will clearly inhibit resale to some degree,[12] require their rejection, as does the Company's failure to establish that the costs its TLAs are designed to recover are reasonable in amount and in their terms and conditions of payment. The Commission therefore will not reach the Department's claim that *all* TLAs are inherently anti-competitive and unreasonably restrict resale.

Finally, although this case has focused heavily and appropriately on the cost justification for the TLAs proposed by the Company, it is important to note that all the terms and conditions of long-term contracts, not just their price terms, must be fair and reasonable, non-discriminatory, and not unreasonably restrictive in their effect on resale. In the second TLA case in this series,[13] the Commission found that specific long-term contract provisions – lengthy contract terms, automatic renewals without notice, failure to identify services as competitive – compounded the contracts' anti-competitive effects. It is not clear from the Company's filing that these concerns have been effectively addressed. To the contrary, the proposal to impose the TLAs on resellers if the ultimate customer defaults further compounds their anti-competitive effect.

Similarly, it is not clear that the Company has exhausted its rate design options for mitigating the anti-competitive effects of TLAs in long-term contracts. Currently the Company uses two methods to collect the up-front costs of long-term contracts – it amortizes them over the full contract term or it charges a TLA. There are other options, however – higher initial fees, higher monthly fees, deposits – and it is not clear that they have been adequately explored.

For all these reasons, the Commission finds that the proposed TLAs do not meet statutory standards of fairness and reasonableness and that they unreasonably restrain the resale of Qwest's wholesale services.

D. The TLA Proposal Is Unduly Discriminatory

The government agencies and the competitive local exchange carriers who intervened in this case argued that it was unreasonably discriminatory for Qwest's tariffs to waive TLAs for contract

---

[12] Although it seems inarguable that high termination fees will discourage customers from terminating contracts with Qwest to take service from resellers, the Department has provided three affidavits illustrating TLAs' real-life effects. In all three cases, TLAs had a clear negative impact on competition. See the Department's filing of February 27, 2001.

[13] In the Matter of U S WEST Communications, Inc.'s Proposed Revisions to Termination Liability Assessments, Docket No. P-421/EM-98-769, ORDER REJECTING TARIFF/PRICE LIST REVISIONS, CLARIFYING PRACTICAL EFFECT OF FILING, AND STAYING IMPLEMENTATION OF FUTURE TARIFF/PRICE LIST REVISIONS (October 13, 1998).

customers who terminate their contracts to take a more expensive service from Qwest, but not for contract customers who terminate their contracts to take a more expensive service from a reseller. The Commission agrees.

The record does not demonstrate any cost basis for treating these two classes of customers differently. The Company's sunk and unrecovered retail costs would appear to be the same whether a customer terminates a long-term contract to sign a more expensive contract with Qwest or with a reseller. In the absence of countervailing evidence, the Commission concludes that this tariff term discriminates against upgrading customers choosing a resale provider, violating state statutes prohibiting undue discrimination[14] and state and federal statutes prohibiting unreasonable restrictions on resale.[15]

Furthermore, Qwest's inability to document its grounds for waiving the TLAs in 226 of the 483 termination cases it was able to identify is worrisome, given the high potential for discrimination posed by TLAs.

E. The Commission Cannot Modify the Company's Proposal

The Company urged the Commission to use the record and its own judgment to establish an alternative TLA level, if it felt compelled to reject the Company's proposal. The Commission cannot do this for several reasons.

As explained above, this record lacks the accuracy and precision necessary to support any level of TLA. The tariff language is at points unduly discriminatory. It is not clear that contract terms and conditions previously deemed anti-competitive have been corrected. The reasonableness of the costs for which recovery is claimed has not been established. The potential to use rate design to mitigate the most anti-competitive effects of TLAs has not been fully explored. The Department's claim that all TLAs are unreasonable restrictions on resale has not been decided.

For all these reasons, the Commission declines to set a TLA policy for Qwest on this record.

[14] Minn. Stat. § 237.60.

[15] Minn. Stat. § 237.121 (a) (5) and 47 U.S.C. § 251(b)(1) and 47 U.S.C. § 251(c)(4).

ORDER

1. The tariff/price list revisions filed by Qwest on August 17, 2000 and amended in its post-hearing comments are hereby rejected.

2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).